Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; JAMES PRICE, Superintendent of State Correctional Institution at Greene; RAYMOND J. COLLERAN, Superintendent of State Correctional Insitution at Waymart; COMMONWEALTH OF PENNSYLVANIA,
Petitioners,

v.

GEORGE E. BANKS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 99-9005

GEORGE E. BANKS,
Appellant

v.

MARTIN HORN, Commissioner, PA Dept of Corrections; JAMES PRICE, Superintendent of State Correctional Institute Greene; RAYMOND J. COLLERAN, Superintendent State Correctional Institute Waymart; COMMONWEALTH OF PENNSYLVANIA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 99-cv-00438)
District Judge: Honorable James F. McClure, Jr.

Argued April 2, 2001 and
On Remand from the United States Supreme Court
by Order of June 17, 2002
Before: SLOVITER, ROTH and RENDELL, *Circuit Judges*

JUDGMENT

This case having been heard on the record from the United States District Court for the Middle District of Pennsylvania, and having been remanded to this Court by order of the United States Supreme Court dated June 17, 2002, it is now here

ORDERED and ADJUDGED by this Court that Banks's sentence, as set forth in the Order of the District Court entered on September 16, 1999, be and the same is hereby VACATED and the case is REMANDED with directions to grant a provisional writ of habeas corpus directing resentencing. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/
Marcia M. Waldron, Clerk

Dated: January 14, 2003

PRECEDENTIAL

Filed January 14, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 99-9005

GEORGE E. BANKS,
Appellant

v.

MARTIN HORN, Commissioner, PA Dept of Corrections; JAMES PRICE, Superintendent of State Correctional Institute Greene; RAYMOND J. COLLERAN, Superintendent State Correctional Institute Waymart; COMMONWEALTH OF PENNSYLVANIA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 99-cv-00438)
District Judge: Honorable James F. McClure, Jr.

Argued April 2, 2001 and
On Remand from the United States Supreme Court
by Order of June 17, 2002

Before: SLOVITER, ROTH and RENDELL, Circuit Judges

(Filed: January 14, 2003)

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OPINION OF THE COURT

RENDELL, Circuit Judge:

In *Horn v. Banks*, 122 S. Ct. 2147 (2002), the United States Supreme Court directed us to analyze whether *Mills v. Maryland*, 486 U.S. 367 (1988), could be retroactively applied under the principles articulated in *Teague v. Lane*, 489 U.S. 288 (1989), for purposes of our collateral review of George Banks's conviction and sentence. As a result, the Court reversed that portion of our opinion in *Banks v. Horn*, 271 F.3d 527 (3d Cir. 2001), dealing with *Teague*. We now conclude that *Mills* did not announce a new rule of constitutional law for retroactivity purposes, and thus that our analysis and resolution of Banks's *Mills* claims was proper. Accordingly, we will endorse the reasoning set forth in the remainder of our prior opinion.

I.

George Banks was sentenced to death for the murder of thirteen people in Wilkes-Barre, Pennsylvania, in 1982. His conviction and sentence were upheld by the Supreme Court of Pennsylvania on direct appeal, *Commonwealth v. Banks*, 521 A.2d 1 (Pa. 1987), and on appeal for state post-conviction relief. *Commonwealth v. Banks*, 656 A.2d 467 (Pa. 1995). Banks then sought a writ of habeas corpus in the Middle District of Pennsylvania, which was denied in August of 1999. *Banks v. Horn*, 63 F. Supp. 2d 525 (M.D. Pa. 1999).

On October 31, 2001, we reversed the District Court and granted Banks a provisional writ of habeas corpus, finding meritorious Banks's argument that his death sentence was unconstitutional. *Banks v. Horn*, 271 F.3d 527 (3d Cir. 2001) ("Banks I"). Specifically, we found that the sentencing phase instructions and forms violated *Mills v. Maryland*, 486 U.S. 367 (1988). In *Mills*, the United States Supreme Court reversed a death sentence where there was a substantial probability that a reasonable jury could have understood the sentencing instructions and forms to disallow the consideration of mitigating factors not unanimously found to exist. *Id.* at 384. In *Banks I*, we concluded that based on the language of the instructions and verdict slip employed in Banks's penalty phase, a reasonable possibility existed that the jurors believed they were precluded from considering mitigating evidence they had not found unanimously. *Banks I*, 271 F.3d at 547-551.

In reaching that conclusion, we were presented with the question of whether *Mills* was applicable for purposes of our collateral review of Banks's conviction and sentence under *Teague v. Lane*, 489 U.S. 288 (1989). In *Teague*, the Supreme Court revolutionized the structure for analyzing the retroactivity of criminal procedure decisions, holding that, with rare exception, prisoners may not rely on "new rules" -- essentially, rules not settled by pre-existing precedent -- for purposes of federal habeas corpus review. *Id.* at 299-301. *Teague* thus directed that new decisions of constitutional criminal procedure that are favorable to a prisoner are usually inapplicable once the prisoner has fully exhausted her direct appeals, including the filing of a writ of certiorari to the United States Supreme Court. *Id.*

Teague's new rule of nonretroactivity was premised at least in part on a respect for the workings of state courts and

state judges appropriate to our federal system. In particular, the Supreme Court has noted that by validating "reasonable, good-faith interpretations of existing precedents made by state courts," the principles of nonretroactivity established in *Teague* "effectuate[] the States' interest in the finality of criminal convictions and foster[] comity between federal and state courts." *Gilmore v. Taylor*, 508 U.S. 333, 340 (1993); *see also Teague*, 489 U.S. at 308.

Because Banks's conviction became final in October of 1987,[1] eight months before the Supreme Court issued its decision in *Mills*, one of the Commonwealth's primary arguments before us in *Banks I* was that *Mills* was not applicable to Banks's petition for habeas relief. We disagreed. We reasoned that, although *Teague* "retroactivity is a 'threshold question,'" *Banks I*, 271 F.3d at 541 (quoting *Teague*, 489 U.S. at 300), because the Pennsylvania Supreme Court decision itself applied *Mills* (albeit doing so unreasonably), neither *Teague*, nor its underlying purposes, required us to perform a retroactivity analysis of *Mills*. *Banks I*, 271 F.3d at 541-43. Instead, we found it necessary only to review the merits of the Pennsylvania Supreme Court's decision, concluding:

> *Teague* teaches that the federal courts in habeas corpus proceedings should be reluctant to apply new rules of federal jurisprudence in state court cases

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[1] A conviction becomes final for *Teague* purposes "when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). Banks's conviction was therefore final when the Supreme Court denied certiorari on October 5, 1987. *Banks v. Pennsylvania*, 484 U.S. 873 (1987).

> decided before such new rules were handed down. Principles of comity and finality counsel that we maintain a circumscribed scope of habeas review. Here, however, . . . the Pennsylvania Supreme Court applied *Mills*. We are examining the application of *Mills*, not because we wish to impose a new rule not considered by the Pennsylvania Supreme Court, but as the court in fact *did* consider and apply it. In such a situation, *Teague* is not implicated. Accordingly, we need ask only whether the Pennsylvania Supreme Court's application of *Mills* should be disturbed under [the appropriate standard of review].

Id. at 543 (citations omitted). Accordingly, we held that resolution of the retroactivity of *Mills* under *Teague* was unnecessary, and proceeded directly to our examination of the merits of the Pennsylvania Supreme Court's application of *Mills* to the facts presented in Banks's appeal. As noted above, we resolved that question in Banks's favor, holding that the sentencing phase jury instructions and forms were clearly unconstitutional, and therefore that the Pennsylvania Supreme Court's decision finding otherwise involved an unreasonable application of established Supreme Court precedent. *Id.* at 551.

In *Horn v. Banks*, 122 S. Ct. 2147, 2148 (2002) ("Banks II"), the Supreme Court concluded otherwise, explicitly and emphatically holding that "federal courts must address the *Teague* question when it is properly argued by the government." In doing so, the Court focused on its statements in *Caspari v. Bohlen*, 510 U.S. 383 (1994), that *Teague*'s "nonretroactivity principle *prevents* a federal court from granting habeas corpus relief to a state prisoner based on a" new rule, and thus that "if the State . . . argue[s] that the defendant seeks the benefit of a new rule of constitutional

law, the court must apply *Teague* before considering the merits of the claim." *Id.* at 389 (emphasis in original). Applying these principles, the Supreme Court found that it was "incumbent upon" us to "perform a *Teague* analysis before granting respondent relief under *Mills*," and that we "erred in concluding that [we] did `not need to focus on anything other than the reasoning and determination of the Pennsylvania Supreme Court.'" *Banks II*, 122 S. Ct. at 2150 (quoting *Banks I*, 271 F.3d at 541). Accordingly, the Supreme Court "reverse[d] [our] holding that `*Teague* is not implicated' by this case, and remand[ed] for further proceedings consistent with" its decision. *Banks II*, 122 S. Ct. at 2151 (quoting *Banks I*, 271 F.3d at 543).[2]

II.

We note at the outset that our determination as to the merits of Banks's *Mills* claim was not reviewed by the Supreme Court. The Court thus did not vacate our previous decision but only reversed that portion of our opinion that concluded that a *Teague* analysis was unnecessary for our review of Banks's habeas petition. Accordingly, the sole issue presently before us is whether our application of *Mills* on habeas review of Banks's sentence was improper under the Supreme Court's nonretroactivity jurisprudence.[3] To

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[2] On July 12, 2002, Banks filed a Petition for Rehearing. The Supreme Court recalled its issuance of judgment on July 17, but on August 26, the Court denied rehearing and reissued judgment.

[3] This is not the first time we have been presented with the issue of the retroactivity of *Mills*. In *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 306 n.19 (3d Cir. 1991), we "decided to reach the

(Continued)

provide background for the analysis, we first briefly discuss the Court's decision in *Mills* itself, then turn to an examination of the Supreme Court's retroactivity framework.

A.

In *Mills*, the Court considered the constitutionality of a set of jury instructions, as well as the implementing verdict forms, that could be understood to prevent the consideration of mitigating circumstances if the jury was not unanimous in finding the existence of such circumstances. *Mills*, 486 U.S. at 371. That is, "even if some or all of the jurors were to believe *some* mitigating circumstance or circumstances were present, unless they could unanimously agree on the existence of the same mitigating factor, the sentence necessarily would be death."[4] *Id.* (emphasis in original). The Court cited the following two possibilities as constitutionally problematic:

(Continued)

merits of the *Mills* claim . . . [but] did not expressly hold whether *Mills* falls outside the *Teague* bar." *Frey v. Fulcomer*, 132 F.3d 916, 920 n.4 (3d Cir. 1997). In *Frey*, we noted the issue but did not reach it because the Commonwealth failed to raise it, and we deemed it waived. *Id.*

[4] The Maryland Court of Appeals upheld the sentence of death. *See Mills v. State*, 527 A.2d 3 (1987). Although it agreed that "if the statute and form were read as petitioner suggested, jurors *would be* improperly prevented from giving due consideration to mitigating evidence," *see Mills*, 486 U.S. at 372 (emphasis in original), the Court of Appeals adopted a construction of the statute exonerating it from the potential constitutional issue. *See Mills*, 527 A.2d at 12-17.

> If eleven jurors agree that there are six mitigating circumstances, the result is that no mitigating circumstance is found. Consequently, there is nothing to weigh against any aggravating circumstance found and the judgment is death even though eleven jurors think the death penalty wholly inappropriate. . . .
>
> [In] a situation just as intuitively disturbing: All 12 jurors might agree that some mitigating circumstances were present, and even that those mitigating circumstances were significant enough to outweigh any aggravating circumstance found to exist. But unless all 12 could agree that the same mitigating circumstance was present, they would never be permitted to engage in the weighing process or any deliberation on the appropriateness of the death penalty.

Id. at 373-74 (citations omitted). Noting that imposition of the death penalty under such circumstances would "be the height of arbitrariness," *id.* at 374, it went on to state:

> It is beyond dispute that in a capital case *the sentencer* may not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. The corollary that *the sentencer* may not refuse to consider *or be precluded from considering* any relevant mitigating evidence is equally well established.

Id. at 374-75 (first and third emphasis added) (quotations and citations omitted). The Court then reiterated the constitutional problem at hand: "[I]f petitioner is correct, a jury that

does not unanimously agree on the existence of any mitigating circumstance may not give mitigating evidence any effect whatsoever, and must impose the sentence of death." *Id.* at 375. The Court stated that its existing jurisprudence prohibited any "barrier to the sentencer's consideration of all mitigating evidence. . . . [w]hatever [its] cause." *Id.* As the Court found a "substantial probability" that reasonable jurors would have understood themselves as being precluded from considering mitigating evidence not found unanimously, the Court reversed Mills's sentence of death, concluding: "Under our cases, the sentencer must be permitted to consider all mitigating evidence. The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk." *Id.* at 384.

B.

Again, the sole issue before us is whether the rule enunciated in *Mills* is retroactively applicable to Banks's appeal. Retroactivity analysis is governed by the principles first articulated in *Teague v. Lane*, in which the Supreme Court held that "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague*, 489 U.S. at 310. Application of this principle of retroactivity proceeds in three steps. *See, e.g., Caspari*, 510 U.S. at 390. First, we must determine when the defendant's conviction became final. *Id.* Second, we must survey the legal landscape to determine whether or not the case in question announced a new rule of constitutional law. *Id.* Finally, if we determine that the case did announce a new rule, we must consider whether it fits into one of the two exceptions to nonretroactivity. *Id.* Those exceptions are reserved for (1) rules that

"place[] a class of private conduct beyond the power of the State to proscribe, . . . or address[] a substantive categorical guarantee accorded by the Constitution, such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense," or (2) "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 494-95 (1990) (citations and internal quotations omitted). Because the exceptions find rather narrow applicability, however, the typically dispositive step in the *Teague* retroactivity analysis is the determination of whether the implicated constitutional principle qualifies as a "new rule."

In *Teague* itself, the Court admitted that it is "often difficult to determine" whether a case announces a new rule, and explicitly avoided any "attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes." *Teague*, 489 U.S. at 301. The Supreme Court has further recognized that the inquiry is particularly difficult where the decision in question merely extended the reasoning of prior cases. *See, e.g., Saffle*, 494 U.S. at 488; *Graham v. Collins*, 506 U.S. 461, 467 (1993); *Butler v. McKellar*, 494 U.S. 407, 412-13 (1990); *see also Mackey v. United States*, 401 U.S. 667, 695 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) (noting the "inevitable difficulties" in distinguishing new rules from the application of old rules in analogous cases).

Perhaps as a result of the inevitable difficulty in articulating one test to govern all possible retroactivity scenarios, the Supreme Court has "stated variously the formula for determining when a rule is new." *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997). Under the Court's original explication in *Teague*, "a case announces a new rule when it

breaks new ground or *imposes a new obligation* on the States or the Federal Government." *Teague*, 489 U.S. at 301 (emphasis added). "To put it differently," the *Teague* Court explained, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* (emphasis in original); *see also, e.g., Graham*, 506 U.S. at 467 ("A holding constitutes a new rule within the meaning of *Teague* if it breaks new ground, imposes a new obligation on the States or the Federal Government, or was not *dictated* by precedent existing at the time the defendant's conviction became final." (quotations omitted) (emphasis in original)). Similarly, the Court has stated that previous precedents must not simply "inform, or even control or govern" the analysis, but instead must "compel the rule" sought by the defendant. *Saffle*, 494 U.S. at 491; *see also Butler*, 494 U.S. at 415 (noting that it is insufficient that a decision was considered to be controlled or governed by prior opinions).

At the same time, the Court has focused on the decision-making process confronting state court judges. *See, e.g., O'Dell*, 521 U.S. at 156 ("At bottom, . . . the *Teague* doctrine `validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.'" (quoting *Butler*, 494 U.S. at 414)); *Graham*, 506 U.S. at 467; *Teague*, 489 U.S. at 308. And, in recent decisions, the Court has approached the inquiry from the standpoint of a "reasonable jurist." In *Lambrix v. Singletary*, 520 U.S. 518 (1997), for instance, the Court asked whether the "unlawfulness of [the defendant's] conviction was apparent to all reasonable jurists." *Id.* at 527-28; *see also id.* at 531 (examining whether a "reasonable jurist . . . could have reached a conclusion different from" the one ultimately reached by the Supreme Court); *id.* at 526 (stating that our inquiry is to "determine whether a state court

considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution" (quotations omitted)); *O'Dell*, 521 U.S. at 166 ("*Teague* asks state court judges to judge reasonably, not presciently."). In sum, "unless reasonable jurists hearing petitioner's claim at the time his conviction became final `would have felt compelled by existing precedent' to rule in his favor, we are barred from doing so now." *Graham*, 506 U.S. at 467 (quoting *Saffle*, 494 U.S. at 488).

III.

We hold that *Mills* did not announce a new rule of constitutional law for retroactivity purposes, and accordingly that our application of Mills on our habeas review of Banks's sentence was completely proper.[5] There are four aspects to our reasoning: (1) the legal landscape at the time of Banks's conviction, (2) the Supreme Court's decision in *Mills* itself,

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[5] Because we conclude that *Mills* did not announce a new rule under *Teague*, we need not address Banks's arguments regarding whether *Mills* falls within one of the two exceptions to nonretroactivity. We note, however, that in *Williams v. Dixon*, 961 F.2d 448, 454-56 (4th Cir. 1992), the Court of Appeals for the Fourth Circuit held that *Teague* does not bar application of *Mills* (and *McKoy v. North Carolina*, 494 U.S. 433 (1990)) on habeas because they are "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Graham*, 506 U.S. at 478 (quotations omitted); *see also Gall v. Parker*, 231 F.3d 265, 323 (6th Cir. 2000) (holding that *Mills* did not announce a new rule under *Teague* but also finding that, even if Mills did announce a new rule, it falls within the second *Teague* exception); *Jermyn v. Horn*, No. 97-634, 1998 WL 754567, at *36-39 (M.D. Pa. Oct. 27, 1998) (holding that *Mills* is a new rule but falls within the second *Teague* exception).

(3) the relevant post-*Mills* decisions of the Supreme Court, and (4) the opinions of our sister Courts of Appeals who have addressed whether *Teague* bars retroactive application of *Mills*.

Our "first and principal task" under *Teague* is to survey the legal landscape to determine whether *Mills* "was dictated by then existing precedent . . . that is, [whether] the unlawfulness [of the situation in *Mills*] was apparent to all reasonable jurists." *Lambrix*, 520 U.S. at 527-28. As discussed above, in *Mills* the Supreme Court reversed a sentence of death where there was "a substantial probability that reasonable jurors, upon receiving the judge's instructions in th[e] case, and in attempting to complete the verdict form as instructed, . . . thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of " any particular circumstance. *Mills*, 486 U.S. at 384. We find highly persuasive Banks's argument that, given the legal landscape, *Mills* represented merely an application of the well established constitutional rule that the Eighth Amendment prohibits all barriers to the sentencer's consideration of any and all mitigation evidence in the penalty phase of a capital trial.

By the time Banks's conviction became final in 1987, the legal landscape was primarily defined by Supreme Court case law spanning nearly a dozen years.[6] We begin our

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[6] It is worth noting that although the Supreme Court has instructed that "the reasonable views of state courts are entitled to consideration" as part of the legal landscape, *Caspari v. Bohlen*, 510 U.S. 383, 395 (1994), both parties have focused exclusively on Supreme Court precedent. At any rate, we believe that here the Supreme Court's case law adequately depicts the legal landscape at the time of Banks's conviction.

examination of this precedent with the Supreme Court's decision in *Woodson v. North Carolina*, 428 U.S. 280 (1976), which struck down North Carolina's mandatory death penalty statute. Of the many constitutional flaws the plurality found in North Carolina's capital sentencing structure,[7] one particularly notable defect was its "failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." *Woodson*, 428 U.S. at 303; *see also Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1977) (striking down Louisiana's mandatory death penalty statute). The plurality reiterated that death as a penalty is distinguishable in kind from all other penalties, and held that "the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson*, 428 U.S. at 304 (citations omitted); *see also Roberts*, 428 U.S. at 333-34 (plurality opinion) (noting that the Constitution requires a "focus on the circumstances of the particular offense and the character and propensities of the offender"); *Jurek v. Texas*, 428 U.S. 262, 271 (1976) (plurality opinion) (stating that the Eighth and Fourteenth Amendments require that the sentencer be allowed to consider mitigating circumstances).

The Court articulated the full import of *Woodson*'s constitutional directive more clearly in *Lockett v. Ohio*, 438

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[7] The Court's opinion in *Woodson* was a plurality of three -- Justices Powell, Stevens, and Stewart. Justices Brennan and Marshall both concurred in the judgment given their opinion that capital punishment inherently violates the Eighth and Fourteenth Amendments.

U.S. 586 (1978), in which it struck down a statute that restricted the range of mitigating factors that could be considered by a jury.[8] Whereas *Woodson* involved a statute precluding any consideration of mitigating evidence, *Lockett* involved somewhat more complex questions: "which facets of an offender or his offense [are] relevant in capital sentencing," and "what degree of consideration of relevant facets" does the Constitution require. *Id.* at 604. The Court responded, in expansive language, that:

> [T]he Eighth and Fourteenth Amendments require that *the sentencer* . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. (first emphasis added). The Court explained that:

> Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. . . . .
>
> There is no perfect procedure for deciding in which cases governmental authority should be used to

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[8] *Lockett*'s plurality opinion was written by Chief Justice Burger and joined by Justices Powell, Stevens, and Stewart. Justice Brennan took no part in the case, and Justice Marshall again concurred on the ground that capital punishment is always unconstitutional.

> impose death. But a *statute that prevents the sentencer in all capital cases from giving independent mitigating weight* to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Id. at 605 (emphasis added). In *Lockett*, the Court stated in unequivocal terms that to "meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." Id. at 608.

Four years later, in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the constitutional rule articulated in *Lockett* was first adopted and applied by a majority of the Court. In *Eddings*, the statute in question allowed defendants to present evidence of any mitigating circumstance-- unlike the statute at issue in *Lockett* -- but the trial judge found that he was unable to consider certain mitigating evidence as a matter of law. *Id.* at 113. The Supreme Court reversed, describing *Lockett* as requiring that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor," *id.* at 112, and holding that:

> The limitations placed by these courts upon the mitigating evidence they would consider violated the rule in *Lockett*. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, *neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.* In this instance, it was as if the trial judge had

> instructed the jury to disregard the mitigating evidence proffered on his behalf. The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Id. at 113-115 (emphasis added). Thus, in *Eddings*, the *Lockett* plurality's constitutional rule was solidified as a settled and prominent feature of the Supreme Court's death penalty jurisprudence; indeed, the Court thereafter characterized the rule as one of the two prerequisites to a valid death sentence imposed by the Eighth Amendment. *See California v. Brown*, 479 U.S. 538, 541 (1987); *see also Penry v. Lynaugh*, 492 U.S. 302, 318 (1989) (stating that by early 1986 "it was clear from *Lockett* and *Eddings*" that the Constitution prohibited a State from "prevent[ing] the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty"). The legal landscape at the time of Banks's conviction, however, was further shaped by three additional cases in which the Court had occasion to apply the *Lockett/Eddings* rule.

First, in *Skipper v. South Carolina*, 476 U.S. 1 (1986), the Supreme Court relied on *Lockett* and *Eddings* to reverse the defendant's death sentence after the trial judge ruled that certain mitigating evidence was inadmissible and prohibited the sentencing jury from considering it. The Court began by reiterating its "well established" *Lockett/Eddings* rule, stating:

> There is no disputing that . . . in capital cases the sentencer may not be precluded from considering, as a mitigating factor, any aspect of a defendant's

> character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Equally clear is the corollary rule that the sentencer may not refuse to consider or be precluded from considering any mitigating evidence.

Id. at 4 (quotations and citations omitted). The Court then addressed the sole question before it: "whether the exclusion from the sentencing hearing of the testimony petitioner proffered . . . deprived petitioner of his right to place before the sentencer relevant evidence in mitigation of punishment." *Id.* Noting that it could "hardly be disputed" that the exclusion did have that effect, *id.*, the Court concluded that "[t]he exclusion by the state trial court of relevant mitigating evidence impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender." *Id.* at 8.

A year later, in *California v. Brown*, 479 U.S. 538 (1987), the Court again affirmed the constitutional principles established in *Lockett* and *Eddings*, but this time upheld the underlying death sentence.[9] In *Brown*, the defendant challenged the constitutionality of "an instruction informing jurors that they `must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.'" *Brown*, 479 U.S. at 540. The Court began by reiterating that the Eighth Amendment requires that capital defendants be allowed to introduce any relevant mitigating evidence, and further that consideration of such evidence

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[9] The Supreme Court has made clear that *Brown* was not dictated by *Lockett* and *Eddings*. *See Saffle*, 494 U.S. at 494. Nonetheless, the decision constitutes part of the legal landscape prior to Banks's conviction becoming final.

is a "`constitutionally indispensable part of the process of inflicting the penalty of death.'" *Brown*, 479 U.S. at 541 (quoting *Woodson*, 428 U.S. at 304). Applying these principles to the instruction before them, however, the Court found that it merely "prohibit[ed] juries from basing their sentencing decisions on factors not presented at the trial, and irrelevant to the issues at the trial," limitations fully consistent with the Constitution's requirement that the jury be allowed to consider any *mitigating* evidence. *Brown*, 479 U.S. at 543; *see also Saffle*, 494 U.S. at 488-95 (holding that *Teague* precluded the defendant's constitutional challenge to a jury instruction requiring jurors to avoid the influence of sympathy in sentencing).

Finally, in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the Supreme Court unanimously reversed the defendant's death sentence where an "advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances." *Id.* at 398-99. The Court held that such a circumstance "did not comport with the requirements of *Skipper*, *Eddings*, and *Lockett*," *id.* at 399 (citations omitted), which established that "the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence." *Id.* at 394 (quotations omitted). The Court concluded, "[O]ur cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid." *Id.* at 399; *see also Burger v. Kemp*, 483 U.S. 776, 790 n.7 (1987) (affirming, in dicta, the constitutional principles established in *Lockett* and *Eddings*); *Sumner v. Shuman*, 483 U.S. 66, 75-76 (1987) (same).

Although Banks relies primarily on the *Lockett/Eddings* line of cases, we mention another Supreme Court case, *Andres v. United States*, 333 U.S. 740 (1948), that was

cited in *Mills* and relied on by another Court of Appeals in deciding this issue. *See Mills*, 486 U.S. at 377 & n.9; *Gall v. Parker*, 231 F.3d 265, 323 (6th Cir. 2001). *Andres* involved an assessment and interpretation of a federal death penalty statute, and the question of whether a trial court's unanimity instructions pursuant to that statute were erroneous. *Id.* at 746. The statutory scheme was structured such that the finding of guilt meant the automatic imposition of the death penalty unless the verdict was qualified by the phrase "without capital punishment." *Id.* The government argued that the jury's determination as to guilt was conclusive as to the death penalty unless the jury then unanimously decided to qualify the verdict. *Id.* The Supreme Court opined, however, that the proper construction required that the "jury's decision upon both guilt and whether the punishment of death should be imposed must be unanimous." *Id.* at 749. That is, the Court required that the jury consider and be unanimous that death *should* be the penalty imposed. Although it recognized that "the interpretation .. . urged by the Government cannot be proven erroneous with certainty," the Court found its construction "more consonant with the general humanitarian purpose of the statute and the history of the Anglo-American jury system." *Id.* at 748-49. The Court then held that the instruction given to the jury by the District Court conveyed the erroneous interpretation of the statute. *Id.* at 749-52. Under the instructions given, the Court concluded, the jury might have erroneously but "reasonably conclude[d] that, if they [could not] all agree to grant mercy, the verdict of guilt must stand unqualified." *Id.* at 752. Accordingly, the Court overturned the sentence and ordered a new trial. *Id.*

Clearly, the *Andres* decision took place within a different statutory context and, in our view, is not a model of clarity. However, because it, like *Mills*, involved jury instructions on unanimity in a capital case, *Andres* certainly

plays some role in the relevant legal landscape -- a conclusion reinforced by the Court's citation to it in *Mills* itself. *See Mills*, 486 U.S. at 377 & n.9. At the very least, *Andres* invokes a number of themes that, significantly, are consistent with and complimentary to the Court's later constitutional death penalty jurisprudence. For instance, *Andres* indicates a concern for particular clarity in capital jury instructions, noting that doubts "should be resolved in favor of the accused." *Andres*, 333 U.S. at 752; *see also Mills*, 486 U.S. at 377. Further, it is particularly noteworthy that the upshot of the Court's decision was that the statute and jury instructions were interpreted to avoid a situation in which a juror could be prevented -- by operation of a requirement for unanimity to avoid the death penalty, and, accordingly, by the views of other jurors -- from giving effect to his or her belief that death was an inappropriate sentence under particular circumstances. *Andres*, 333 U.S. at 748-52.

We agree with Banks that this legal landscape -- as exemplified by *Lockett* and *Eddings*, but also including at least *Andres*, *Woodson*, *Skipper*, *Brown*, and *Hitchcock* -- strongly supports Banks's position that the Court in *Mills* did not develop any new principle of law, but instead merely relied upon clear and well established constitutional rules, such that *Mills* was compelled and dictated by the legal landscape, and no reasonable jurist could have reached a different result. Insofar as the landscape evidenced the Supreme Court's unwavering recognition and insistence that the Eighth Amendment prohibits any barrier to the sentencer's consideration of mitigating evidence, it provided a clear indication that a jury instruction that could work to prevent a juror from considering any and all mitigating evidence, whether because of unanimity requirements or otherwise, would be constitutionally infirm.

In reaching this conclusion, we are not unmindful of the difficulty of employing *Teague*'s mandates to divine whether the legal landscape supports a finding that a rule is or is not new, given the Court's various formulations of the measuring stick for determining whether a particular case does or does not announce a new rule. It is not precisely clear just how short the "step" must be between existing precedent and the current announcement, or how strong the pull of precedent must be in a certain direction. There certainly must be some gradation or difference, or the rule in question would not be even arguably new. Thus, a decision that does extend reasoning may nonetheless be viewed as not "new" under *Teague*. The Supreme Court has acknowledged as much when it has noted the difficulty of determining whether a new rule was announced where "a decision extends the reasoning of our prior cases." *Saffle*, 494 U.S. 488; *see also Graham*, 506 U.S. at 467; *Butler*, 494 U.S. at 412-13. To read certain of the operative terms the Court has employed, such as "dictated" and "commanded," narrowly, such that they would require express direction from the existing precedent, would be to unrealistically require courts to have anticipated all future scenarios in order for later cases to not announce a new rule. Another term the Court has used, "compel," has been defined as to "force, drive, [or] impel." *Webster's Third New Int'l Dictionary* 463 (1993). This seems not only to be a more functional description of the test, but it also fits nicely with the concept of the "reasonable jurist" that is referenced in many of the Court's recent cases in this area. That is, we ask whether the existing precedent set forth a rule that all reasonable jurists would agree impels or drives the result in the new situation presented. Here, the existing case law clearly provided that sentencers could not be prevented from considering any and all mitigating evidence. In *Mills*, the Court merely recognized that the perceived need for unanimity could constitute one such

unconstitutional barrier. Even if one were to question whether the result was "dictated" or "commanded" by the constitutional rule itself, it surely was compelled in the sense that previous pronouncements would constrain all reasonable jurists to conclude the situation in *Mills* to be unconstitutional. It is perhaps this shading that distinguishes our view of *Mills* from that of our concurring colleague.[10]

The Supreme Court's reasoning and rhetoric in *Mills* itself follows form from the legal landscape, and bolsters the view that it was not announcing a new constitutional rule. Initially, we note that "[i]t is significant" that *Mills* did explicitly and heavily rely on controlling precedent. *Lambrix*, 520 U.S. at 528. Unlike the situation in *Lambrix*, in which the Supreme Court found a "new rule" in part because the underlying decision cited only a single case -- and with a "cf." signal at that, *see id.* at 528-29 -- *Mills* is replete with references to controlling precedent; the Court frequently cited to and quoted from *Lockett*, *Eddings*, *Skipper*, and *Hitchcock*. *See Mills*, 486 U.S. at 374-76. Moreover, the Court used language in its analysis that does not merely state, but indeed exhorts, the rich precedent compelling its reasoning and result. The Court's precise wording bears repeating here:

> It would certainly be the height of arbitrariness to allow or require the imposition of the death penalty under the circumstances . . . postulated by petitioner. . . . It is beyond dispute that in a capital case "`the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of

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10 In her concurrence, Judge Sloviter focuses on whether *Mills* was "commanded" or "dictated" by the legal landscape in concluding that it announced a new rule.

> the offense that the defendant proffers as a basis for a sentence less than death.'" *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S. Ct. 869, 874, 71 L.Ed.2d 1 (1982), quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964-2965, 57 L.Ed.2d 973 (1978) (plurality opinion) (emphasis in original). *See Skipper v. South Carolina*, 476 U.S. 1, 4, 106 S. Ct. 1669, 1670-1671, 90 L.Ed.2d 1 (1986). The corollary that "the sentencer may not refuse to consider or be precluded from considering `any relevant mitigating evidence'" is equally "well established." *Ibid.* (emphasis added), quoting *Eddings*, 455 U.S., at 114, 102 S. Ct., at 877.
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> . . . .
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> Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, *Lockett v. Ohio*, supra; *Hitchcock v. Dugger*, 481 U.S. 393, 107 S. Ct. 1821, 95 L.Ed.2d 347 (1987); by the sentencing court, *Eddings v. Oklahoma*, supra; or by an evidentiary ruling, *Skipper v. South Carolina*, supra. The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance. Whatever the cause, if petitioner's interpretation of the sentencing process is correct, the conclusion would necessarily be the same: "Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing." *Eddings v. Oklahoma*, 455 U.S., at 117, n., 102 S. Ct., at 878, n. (O'Connor, J., concurring).

> The critical question, then, is whether petitioner's interpretation of the sentencing process is one a reasonable jury could have drawn from the instructions given by the trial judge and from the verdict form employed in this case.

Mills, 486 U.S. at 374-76. Given this language, it can hardly be disputed that *Mills* did not announce a new rule.[11] As the Court recognized, it was well established by the *Lockett/Eddings* line of cases that the Constitution prohibited any barrier to the jury's consideration of mitigating evidence, "[w]hatever the cause." *Id.* at 375. The relevant cases had never indicated that the source or form some particular barrier took would be relevant to its constitutionality; instead they had consistently and repeatedly prohibited, in clear language, *any* barrier. *See, e.g., Hitchcock*, 481 U.S. at 394 ("[I]n capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence." (quotations omitted)); *Skipper*, 476 U.S. at 4 (same); *see also, e.g., Saffle*, 494 U.S. at 491 ("*Lockett* and *Eddings* command that the State must allow the jury to give effect to mitigating evidence in making the sentencing decision."). The extent of the relevant holding in *Mills*, then, was merely its acknowledgment of a conclusion already required by the governing constitutional rules: that if a jury instruction and verdict form, because of its unanimity requirements, precluded juror consideration of any and all mitigation evidence, the resulting death sentence would be

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[11] Although it has been noted that for *Teague* purposes an opinion's language is not always "conclusive," *see, e.g., Butler*, 494 U.S. at 415, we nonetheless find the Court's rhetoric and reasoning in *Mills* to be unique -- providing extensive "evidence tending to prove" that *Mills* did not announce a new rule. *O'Dell*, 521 U.S. at 161 n.2.

unconstitutional. *See McKoy v. North Carolina*, 494 U.S. 433, 438 (1990) ("[A]llowing a `holdout' juror to prevent the other jurors from considering mitigating evidence violated the principle established in *Lockett v. Ohio*, that a sentencer may not be precluded from giving effect to all mitigating evidence." (citation omitted)). That these constitutional principles were settled before *Mills* is further evidenced by the Maryland Court of Appeals decision reversed by the Supreme Court in *Mills* itself, as the disagreement between the Court of Appeals' majority and dissenting opinions was unrelated to the underlying constitutional rules that govern capital sentencing. *See Mills*, 527 A.2d at 13; *id.* at 33 (McAuliffe, J., dissenting) ("[T]he majority and I are in essential agreement as to the basic principles of law that control in a capital sentencing proceeding. . . . A mitigating circumstance . . . must be considered by each juror who believes it to have been proven to exist, irrespective of whether all jurors agree that it exists."); *Mills*, 486 U.S. at 372 ("The [Maryland Court of Appeals] did not dispute that if the statute and form were read as petitioner suggested, jurors *would* be improperly prevented from giving due consideration to mitigating evidence." (emphasis in original)); see also Butler, 494 U.S. at 415 (indicating that actual disagreement on a constitutional rule provides some evidence that it is "new" under *Teague*).

Moreover, we note that recent Supreme Court references to the *Teague* test have indicated that the "determinative question" under *Teague* is whether reasonable jurists, reading the case law in existence at the time the conviction became final, could have concluded that Banks's sentencing "was *not* constitutionally infirm." *Graham*, 506 U.S. at 477 (emphasis in original); *see also id.* at 476 ("The result in a given case is not dictated by precedent if it is susceptible to debate among reasonable minds, or, put differently, if

reasonable jurists may disagree." (quoting *Stringer v. Black*, 503 U.S. 222, 238 (1992) (Souter, J., dissenting)). Given the Supreme Court's reliance on the *Lockett/Eddings* rule as an established requirement of the Eighth Amendment by the time Banks's conviction became final, we are persuaded that the relevant rule in *Mills* was "apparent," and that no "reasonable jurist" could have reached a different conclusion. *Lambrix*, 520 U.S. at 528; *see also, e.g., Butler*, 494 U.S. at 415 (asking whether the relevant outcome was "susceptible to debate among reasonable minds"). Indeed, as the settled *Lockett/Eddings* rule was a blanket prohibition on barriers to the jury's consideration of mitigating circumstances, we find ourselves unable to construct any analytic framework, consistent with the legal landscape, under which *Mills* could have come out differently. *Cf. Lambrix*, 520 U.S. at 532 ("There were at least three different . . . approaches that would have suggested a different outcome."). A failure to decide *Mills* as the Court in fact decided it would not just have taken an "illogical" or "grudging" application of the *Lockett/Eddings* rule, *Butler*, 494 U.S. at 415, it would have taken a completely untenable one. Any reasonable jurist "would have felt compelled" to decide *Mills* accordingly. *O'Dell*, 521 U.S. at 156 (quoting *Lambrix*, 520 U.S. at 527).

While the Commonwealth and our concurring colleague seize on the fact that there were four dissenting justices in *Mills* in arguing that "reasonable jurists" could have differed on the outcome at the time of that case, a careful reading of the *Mills* dissent makes clear that the dissenting justices did not take issue with the principle that jurors must be able to consider all mitigating factors without the requirement of unanimity. The dissenters never questioned the strong statements by the majority to the effect that the result in *Mills* was mandated by the *Lockett/Eddings* line of cases. Rather, they viewed the majority as having applied the wrong

test as to the *probability* that jurors misunderstood the instructions in the factual setting presented. *See Mills*, 486 U.S. at 394 (Rehnquist, J., dissenting) ("[T]he question is whether a reasonable juror operating under the trial court's instructions would have considered evidence of mitigating circumstances in a constitutional manner.").

Our conclusion finds support in the Supreme Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989). In *Penry*, the Court considered a challenge to the Texas death penalty scheme, which limited the jury's consideration of the appropriate sentence during a capital trial to resolving three "special issues." *Id.* at 311-12. The precise question before the Court was whether the defendant's sentence was unconstitutional "because the jury was not adequately instructed to take into consideration all of his mitigating evidence and because the terms in the Texas special issues were not defined in such a way that the jury could consider and give effect to his mitigating evidence in answering them." *Id.* at 313. Despite *Teague*, the Court reversed the death sentence, finding that the jury instructions and special issues structure did not adequately allow the jury to consider the defendant's mitigating evidence of mental retardation and an abused childhood. The Court stated that *Lockett* and *Eddings*, along with *Jurek v. Texas*, 428 U.S. 262 (1976), "dictated" the rule that "Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to th[e] mitigating evidence in determining whether the death penalty should be imposed." *Penry*, 492 U.S. at 318-19; *see also Graham*, 506 U.S. at 475 (indicating that the *Lockett/Eddings* line of cases prohibit situations in which "relevant mitigating evidence [is] placed beyond the effective reach of the sentencer," and require that the jury must have a "reliable

means of giving mitigating effect to" the mitigating evidence);[12] *Saffle*, 494 U.S. at 491 (same).

In arguing for the nonretroactivity of *Mills*, the Commonwealth invokes two other Supreme Court decisions handed down after *Mills*. First, the Commonwealth relies on the dissenting opinion and one of the concurring opinions in *McKoy v. North Carolina*, 494 U.S. 433 (1990), to argue that reasonable minds could have disagreed on the outcome in *Mills*. *See also Caspari*, 510 U.S. at 395 (noting that conflicting holdings of state and federal courts indicates disagreement among reasonable minds); *Sawyer v Smith*, 497 U.S. 227, 236-37 (1990) (noting that the fact that three justices dissented in a prior case casts doubt on the argument that the holding in that case was compelled by prior precedent); *Miller v. Lockhart*, 65 F.3d 676, 686 (8th Cir. 1995) (citing opinions in *McKoy*). In *McKoy*, the Supreme Court affirmed *Mills* unconditionally and applied it to North Carolina's sentencing scheme, holding that the unanimity scheme there, precisely like the one in *Mills*, unconstitutionally precluded jurors from giving effect to evidence they might believe called for a sentence less than death. *McKoy*, 494 U.S. at 439-440. In the dissenting opinion and one of the concurring opinions, however, four justices in *McKoy*

[12] Unlike our concurring colleague, we do not view *Graham v. Collins* as adding anything of significance to the legal landscape. In *Graham*, the Supreme Court decided that, unlike *Penry* -- in which the Court held that the "special issues" structure did not give the jury a genuine opportunity for consideration of diminished capacity attributes such as mental retardation and an abused childhood -- the"special issues" structure *did* place certain mitigating evidence such as youth, family background and positive character traits within the sentencer's "effective reach." *Graham*, 506 U.S. at 475. Thus, a result in Graham's favor was not dictated by *Penry* and the *Penry* rule could not be given retroactive effect.

expressed some level of disagreement with the proposition that *Mills* was merely an application of the *Lockett/Eddings* rule. *See id.* at 452-457 (Kennedy, J., concurring in the judgment); *id.* at 457-471 (Scalia, J., dissenting). *But see id.* at 445-452 (Blackmun, J., concurring) (stating that in *Mills* "[t]he Court concluded that a rule mandating unanimous agreement before any juror could consider a particular mitigating factor was forbidden by [its] decisions in *Lockett* and *Eddings*" (citations omitted)). Despite the Commonwealth's suggestion otherwise, we are unconvinced that *McKoy* evidences anything but the correctness of our conclusion. The concurring and dissenting opinions in *McKoy* are not controlling authority, and our opinion today is in accord with the Court's majority opinions in both *Mills* and *McKoy*, each of which independently makes clear that *Mills* was premised on a straight-forward application of settled constitutional precedent.[13]

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[13] Moreover, to the extent the Commonwealth relies on the *McKoy* minority's view that *Mills* was not actually decided on *Lockett/Eddings* grounds, we are unpersuaded that their argument is particularly relevant. Asking whether *Mills* is retroactive in this case is shorthand for asking whether the rule Banks seeks to have applied on habeas -- that the Constitution prohibits unanimity instructions that preclude jurors from giving proper consideration to proffered mitigating evidence -- was a new rule under *Teague* given the date his conviction became final. It is for similar reasons that, as we discuss below, our decision here is not formally inconsistent with, for instance, the Eighth Circuit's decision in *Miller v. Lockhart*, 65 F.3d 676 (8th Cir. 1995), that *Mills* was a new rule. Our conclusion that *Mills* may be retroactively applied on habeas is essentially an acknowledgment that what Banks seeks (and what *Mills* sought) is a clear application of the *Lockett /Eddings* rule, a constitutional principle well settled prior to his conviction

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Secondly, the Commonwealth places great reliance on the Supreme Court's reasoning in *Saffle v. Parks*, 494 U.S. 484 (1990). In *Saffle*, the Supreme Court upheld a jury instruction that required the jury to "avoid any influence of sympathy" in sentencing, finding that the rule sought by *Saffle*, which was grounded in the principles established in *Lockett* and *Eddings*, was a new rule under *Teague*. *Id.* at 487. According to the Court, "*Lockett* and *Eddings* [did] not speak directly, if at all, to the issue presented" in *Saffle*, "whether the State may instruct the sentencer to render its decision on the evidence without sympathy." *Id.* at 490. In so concluding, the Court noted a distinction between rules relating "to *what* mitigating evidence the jury must be permitted to consider in making its sentencing decision," and those relating "to *how* it must consider the mitigating evidence." *Id.* (emphasis in original). "There is a simple and logical difference," the Court stated, "between rules that govern what factors the jury must be permitted to consider in making its sentencing decision and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision." *Id.* at 490. An anti-sympathy instruction does not preclude the jury from considering any mitigating evidence; it merely instructs them to consider that evidence without recourse to sympathy. *See id.* at 493 ("The State must not cut off full and fair consideration of mitigating evidence; but it need not grant the jury the choice to make the sentencing decision according to its own whims or caprice."). Accordingly, the Court concluded that *Lockett* and *Eddings* do not prohibit such an anti-sympathy instruction. *Id.* at

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becoming final. Thus, it could be argued that it is essentially irrelevant whether or not the rule under inquiry was actually decided in *Mills*.

490-94; *see also Brown*, 479 U.S. at 543 (affirming constitutionality of an anti-sympathy instruction).

The Commonwealth, as well as our concurring colleague, seizes on *Saffle*'s "what" versus "how" distinction as supporting its view that *Mills* was a new rule; in effect, it argues that jury unanimity requirements made unconstitutional by *Mills* are nothing but a rule regarding *how* the jury must consider mitigating evidence, i.e., the jury must consider it unanimously. While perhaps viscerally appealing, upon reflection this linguistic shorthand does not withstand scrutiny. Indeed, we believe that, if anything, *Saffle* supports the conclusion that *Mills* did not announce a new rule. As discussed above, the harm identified in *Mills* by the Supreme Court-- as well as the dissenting opinion in the Maryland Court of Appeals-- was the potential that jurors were precluded from considering any and all mitigating evidence. *See Mills*, 486 U.S. at 375. Quite unlike the anti-sympathy *instruction* considered in *Saffle*, *Mills does* concern the precise harm addressed by the Court in *Lockett* and *Eddings*: Its focus was on *what* -- i.e., any and all -- evidence jurors could consider. Although "unanimously" is clearly an adverb, the meaning of the term "unanimously" as used here does not actually relate to "how" the jury is to view the evidence (as does sympathy). Rather, here unanimity presents a *barrier*, potentially preventing jurors from considering any and all mitigating evidence. To the extent that *Saffle* suggests that such rules are clearly prohibited by *Lockett* and *Eddings*, it lends support to our conclusion here. *See Saffle*, 494 US. at 491 (stating that preventing a jury from "considering, weighing, and giving effect to all of the mitigating evidence . . . . come[s] under the rule of *Lockett* and *Eddings*").

Finally, we note that our conclusion finds additional support in a recent ruling by the Court of Appeals for the

Sixth Circuit. In *Gall v. Parker*, 231 F.3d 265 (6th Cir. 2001), the Sixth Circuit held that application of *Mills* on habeas was not prohibited by *Teague*, both because *Mills* did not announce a new rule and because *Mills* falls within the second of *Teague*'s exceptions to nonretroactivity. With regard to the former conclusion, which is more relevant here, the Sixth Circuit found that *Mills* was "dictated by the *Lockett* rule," and emphasized the language in *Mills* quoted above, in which the Supreme Court made "clear [that] it did nothing more than apply *Lockett* to a new factual situation." *Id.* at 323. The Sixth Circuit also noted the Supreme Court's citation in *Mills* to *Andres v. United States*, 333 U.S. 740 (1948), which the court characterized as "a half-century old death penalty reversal" in which "the Court granted a new trial after finding fault in instructions that `probab[ly]' induced a `reasonable' juror to conclude that unanimity was needed to `qualify' a verdict of guilty in order to preclude a death sentence." *Gall*, 231 F.3d at 323 (quoting *Andres*, 333 U.S. at 752). "Given *Lockett*, *Andres*, and the Court's clear language in *Mills*," the Sixth Circuit concluded that *Mills* did not impose a new constitutional obligation. *Gall*, 231 F.3d at 323.[14]

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[14] Similarly, in an opinion we have previously referred to as "brief but thoughtful," *Frey v. Fulcomer*, 132 F.3d 916, 920 n.4 (3d Cir. 1997), the District of Delaware concluded in 1993 that the "requirement that juries in capital cases be permitted to consider all mitigating factors and aspects of a defendant's character and to give effect to that evidence was firmly established" in *Lockett and Eddings*. *Deshields v. Snyder*, 829 F. Supp. 676, 688 (D. Del. 1993) (quoting *Byrd v. Delo*, 733 F. Supp. 1334 (E.D. Mo. 1990). Accordingly, the court found that *Mills* was "nothing more than a mere extension of then existing precedent to a new factual scenario." *Id.*; *see also, e.g., Hopkinson v. Shillinger*, 781 F. Supp. 737, 742 (D. Wy. 1991) ("The Eighth Amendment [under *Lockett*

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It is worth emphasizing here that Banks's case is far stronger than the one presented to the Sixth Circuit in *Gall*. Whereas Gall's conviction became final in 1981, limiting the legal landscape to primarily the plurality opinion in *Lockett*, Banks' conviction was not final until late in 1987, only months before *Mills* and after the Supreme Court's decisions in *Eddings*, *Skipper*, and *Hitchcock*, in all of which a clear majority of the Court applied the *Lockett* rule and reversed a sentence of death.

In contrast to the Sixth Circuit's decision in *Gall*, two Courts of Appeals have held that *Teague* bars the application of *Mills* on habeas. In *Miller v. Lockhart*, 65 F.3d 676 (8th Cir. 1995), the Eighth Circuit Court of Appeals held that *Mills* announced a new rule, but did so in a case in which, like *Gall*, only *Lockett* had been decided prior to the defendant's conviction becoming final. *Id.* at 685. The question of whether *Mills* was dictated by the plurality opinion in *Lockett* alone may be a close one-- as demonstrated by the contradictory opinions of the Sixth and Eighth Circuits -- but the answer to the question before us is clear. When considering *Lockett* in conjunction with *Eddings*, in which a majority of the Court adopted the rule announced by the *Lockett* plurality, the result in *Mills* was obvious, especially given the Court's continued reliance on and application of the *Lockett* rule, prior to *Mills*, in cases such as *Skipper* and *Hitchcock*.

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and *Eddings*] prohibits barriers to consideration of mitigating evidence whether they result from evidentiary rulings, statute, or jury instructions. Thus, *Mills* and *McKoy* are simply different factual applications of that established principle and are applicable [on habeas].").

The Court of Appeals for the Fifth Circuit has also repeatedly stated that *Mills* announced a new rule under *Teague*. *See Woods v. Johnson*, 75 F.3d 1017, 1036 (5th Cir. 1996); *Nethery v. Collins*, 993 F.2d 1154, 1161-62 (5th Cir. 1993); *Wilcher v. Hargett*, 978 F.2d 872, 877-78 (5th Cir. 1992); *Cordova v. Collins*, 953 F.2d 167, 173 (5th Cir. 1992). However, as we previously noted in *Banks I*, the court has not analyzed or explained its conclusions. *Banks I*, 271 F.3d at 542 n.16. Accordingly, we find little in the Fifth Circuit's decisions to persuade us that our application of *Mills* is prohibited by *Teague*.[15]

IV.

Our previous ruling in this case was reversed by the Supreme Court only insofar as we held it unnecessary to decide whether *Mills* had retroactive application. Because we now hold that our application of *Mills* on habeas review of Banks's sentence was not prohibited by *Teague*, we do not disturb the remainder of our previous opinion, including its discussion and holding with regard to the merits of Banks's *Mills* claim. We merely augment that opinion by essentially replacing its discussion of the *Teague* issue with the analysis here. Accordingly, our judgment requiring a new penalty phase for Banks will remain unchanged.

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[15] We also note that in *McDougall v. Dixon*, 921 F.2d 518, 539 (4th Cir. 1990), the Court of Appeals for the Fourth Circuit indicated in dicta that *Mills* and *McKoy* were new rules under *Teague*. In *Williams v. Dixon*, 961 F.2d 448, 453 n.3 (4th Cir. 1992), however, the court found it unnecessary to consider whether *Mills* and *McKoy* were in fact new rules because it held that they fell within the second *Teague* exception.

SLOVITER, *Circuit Judge, concurring.*

I continue to adhere to the judgment of the court instructing the District Court to grant a provisional writ of habeas corpus directed to the petitioner's penalty phase. However, my response to the issue on which the United States Supreme Court remanded this case to us differs from that of the majority.

I.

In its per curiam opinion remanding this case, *Horn v. Banks*, 536 U.S. 266, 122 S. Ct. 2147 (2002), the Supreme Court directed that we perform an analysis under *Teague v. Lane*, 489 U.S. 288 (1989), as to the retroactive application of *Mills v. Maryland*, 486 U.S. 367 (1988). The Court believed that we had contravened *Caspari v. Bohlen*, 510 U.S. 383 (1994), "in which [the Court] held that federal courts must address the *Teague* question when it is properly argued by the government." *Horn*, 536 U.S. at ___, 122 S. Ct. at 2148. We must therefore, as a threshold issue, address *Teague* which, although a plurality opinion, has since been accepted by the Court as setting forth the standard for retro-activity analysis.

The petitioner in *Teague* sought to challenge the composition of his jury, as the prosecutor had used all 10 of his peremptory challenges to exclude blacks. Teague had argued throughout, without success, that the jury was not a fair cross section. His habeas petition in the Supreme Court sought the benefit of its decision in *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that under the Equal Protection Clause the prosecutor had the burden to give a race-neutral explanation for its use of peremptory challenges to exclude black persons from the petit jury). The Court had previously

held in *Allen v. Hardy*, 478 U.S. 255 (1986) (per curiam), that *Batson*, which overruled a portion of *Swain v. Alabama*, 380 U.S. 202 (1965), could not be applied to a case on collateral review because *Batson* constituted an "`explicit and substantial break with prior precedent.'" *Teague* at 295 (quoting *Allen*, 478 U.S. at 258). Teague's second contention in the Supreme Court, that he established a violation of the Equal Protection Clause under *Swain*, was procedurally barred because Teague never presented that claim to the state courts.

Thus, the Court turned to Teague's fair cross section claim, where he relied on the holding in *Taylor v. Louisiana*, 419 U.S. 522 (1975), that the Sixth Amendment required that the jury venire be drawn from a fair cross section of the community. Teague sought to apply the holding in *Taylor* to the composition of the petit jury. In holding that acceptance of Teague's claim would constitute a new rule that it would not apply retroactively to cases on collateral review, the Supreme Court reformulated the standard previously enunciated in *Linkletter v. Walker*, 381 U.S. 618 (1965), and enunciated the principle that "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague*, 489 U.S. at 310. The Court explained that "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Id.* at 309.

As to the definition of a "new rule," the Supreme Court explained in *Teague* that "[i]n general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government."

Id. at 301. It continued, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* The Court recognized two exceptions to its rule of non-retroactivity, both derived from Justice Harlan's opinion in *Mackey v. United States*, 401 U.S. 667, 675 (1971) (opinion concurring in judgments in part and dissenting in part). The first is for a rule that places "`certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Id.* at 311 (quoting Mackey, 401 U.S. at 692). The second exception is for "watershed rules of criminal procedure." *Id.*

In the Supreme Court's opinion in *Caspari*, the Court elaborated on the responsibility of a federal court faced with a habeas petition seeking relief based on a rule announced after the defendant's conviction became final. *Caspari*, 510 U.S. at 390. The court must survey "the legal landscape" as it existed on the date the defendant's conviction became final and then determine if "a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." *Id.* (citations omitted). If the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the non-retroactivity principle. *Id.*

The rule on which Banks relies is that enunciated in *Mills*. In *Mills*, the Supreme Court vacated a death sentence where the sentencing court's instruction left a substantial probability that the jurors may have believed they had to be unanimous on the existence of a particular mitigating factor before it could be weighed against an aggravating factor in

determining whether the death sentence should be imposed. 486 U.S. at 375-76, 384.

Banks contends that in 1987, at the conclusion of his direct review in state court, the Supreme Court had decided numerous cases creating the framework upon which *Mills* was predicated, and that therefore *Mills* should not be regarded as a new rule for purposes of non-retroactivity under *Teague*. Banks argues that by the time his sentences became final as defined under *Teague* and *Caspari*, the Supreme Court had decided ten cases before *Mills* that "embody the Eighth Amendment prohibition against a state mandated process that creates a barrier to juror consideration of indispensable evidence of the character and record of an offender in a death penalty proceeding." Appellant's Supp. Br. at 3. He counts among those cases *Furman v. Georgia*, 408 U.S. 238 (1972) (invalidating procedures that created a substantial risk that death penalty would be imposed in an arbitrary and capricious manner), and, surprisingly, the three cases after *Furman* that sustained the imposition of death sentences, *Jurek v. Texas*, 428 U.S. 262 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); and *Proffitt v. Florida*, 428 U.S. 242 (1976). Banks' argument is that although the death sentencing schemes were held constitutional in all three cases, the respective schemes allowed the sentencer to consider the defendant's evidence of mitigating circumstances.

Banks states that in *Woodson v. North Carolina*, 428 U.S. 280 (1976), where sentences of death were overturned because the jurors were prevented from considering all mitigating circumstances, the Supreme Court "recognized the constitutional requirement of an `individualized sentencing' in capital cases." Appellant's Supp. Br. at 4. The *Woodson* plurality gave three reasons for its holding: the state statute at issue imposed a mandatory death sentence for certain

offenses; it provided no standards to guide the jury in determining which offenders should be sentenced to death; and it did not allow the sentencer to consider the character and record of an offender and the circumstances of the offense as part of the process of inflicting the death penalty. 428 U.S. at 301-04.

Banks next notes the decision in *Roberts v. Louisiana*, 428 U.S. 325, 333-34 (1976), decided the same day as *Gregg*, *Proffitt*, *Jurek*, and *Woodson*, which also struck down the death penalty statute because, like that in *Woodson*, it failed to provide for any meaningful opportunity for consideration of the character and record of the defendant or the circumstances of the crime. Banks then emphasizes the decision in *Lockett v. Ohio*, 438 U.S. 586, 608 (1978), where the Supreme Court found unconstitutional a state statute that allowed consideration of only a limited number of mitigating factors. Continuing along this line, Banks lists *Eddings v. Oklahoma*, 455 U.S. 104, 113-15 (1982), where the Supreme Court ruled that a sentencing judge improperly decided, as a matter of law, that he could not consider evidence of a defendant's troubled family history and emotional disturbance as mitigating evidence.

He next references *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986), holding that the trial judge improperly ruled that the jury could not consider a defendant's good conduct in prison as mitigating evidence, *California v. Brown*, 479 U.S. 538, 541 (1987), upholding the sentence of death by interpreting the jury instruction to be consistent with the *Eddings* line of cases, and the opinion in *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987), decided shortly thereafter, where the Supreme Court held that a new sentencing hearing was required because the advisory jury and judge should have

considered evidence of non-statutory mitigating circumstances.

Banks argues that this line of cases, embodying the rule that a jury in a capital case must be permitted to consider all mitigating factors, compelled the holding in *Mills* that "prohibited a state from requiring a jury to be unanimous before they could find the existence of a particular mitigating circumstance." Appellant's Supp. Br. at 9. He continues, "The *Woodson-Lockett-Eddings-Dugger* lines of cases dictate such a result." *Id.* He relies on the following language in *Mills*:

> Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, *Lockett v. Ohio*, *supra*; [citation omitted]; by the sentencing court, *Eddings v. Oklahoma*, *supra*, or by an evidentiary ruling, *Skipper v. South Carolina*, *supra* . The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance. Whatever the cause . . . the conclusion would necessarily be the same: `Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing.' *Eddings v. Oklahoma*, 455 U.S., at 117, n. (O'Connor, J., concurring).

Mills, 486 U.S. at 375, quoted in Appellant's Supp. Br. at 9.

Banks finds further support in *Penry v. Lynaugh*, 492 U.S. 302 (1989),[1] the only case in the series to consider the retroactivity issue. The petitioner in *Penry* claimed, *inter alia*, that he was sentenced to death in violation of the Eighth Amendment because the jury was not adequately instructed to take into consideration the mitigating evidence of his mental retardation and abused background. Under the state sentencing scheme, if the jury answered in the affirmative all of the three "special issues" questions required by the statute, the sentencing court was required to impose the death sentence.[2] The same statute had been challenged previously in *Jurek* where the Court rejected the challenge, holding that the state court would interpret the second question to allow the jury to consider mitigating evidence. The *Penry* petitioner argued that the jury would not have been aware that the evidence on which he relied, mental retardation and childhood abuse, could be considered as mitigating circumstances unless it was so instructed by the trial court. The Supreme Court agreed that Penry had a right to resentencing, and remanded so that a new sentencing hearing could be held with instructions informing the jury that it could give effect to the mitigating evidence of Penry's mental retardation and

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[1] The holding in *Penry* rejecting the claim that the Eighth Amendment prohibits the execution of a retarded person was abrogated in *Atkins v. Virginia*, 122 S. Ct. 2242 (2002).

[2] The special issues were (1) whether the defendant's conduct was deliberate and with the reasonable expectation that death would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would be a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. *Penry*, 392 U.S. at 310.

abused background in considering whether to impose a death sentence. *Id.* at 328.

Before reaching its decision, the Court considered whether granting Penry the relief he sought would create a "new rule" under *Teague*. The Court concluded that it was not applying a new rule under *Teague* because, at the time the petitioner's conviction became final, it had already been decided in *Lockett* and *Eddings* that a state could not prevent the sentencer from considering and giving effect to mitigating evidence from the defendant's background, character or circumstances of the offense. *Id.* at 318.

The Commonwealth reads the pre-*Mills* cases differently than does Banks, leading it to conclude that *Mills* announced a new rule. It reads the decisions on which Banks relies, *Lockett*, *Eddings*, *Skipper*, and *Hitchcock*, which represent where the law stood at the time Banks' conviction became final, as reversing the death sentences imposed because the sentencer "had been *entirely precluded* from considering a category of appropriate mitigating evidence." Appellees' Supp. Br. at 4. It points out that in contrast to those cases, the *Mills* jury could hear and consider any evidence of mitigation that the defendant presented. The Commonwealth states that the *Mills* rule (which declared unconstitutional the requirement that jurors agree unanimously on a mitigating factor to be used in the weighing step) went beyond the previously enunciated principle that the jury must be allowed to consider mitigating evidence. The Commonwealth argues that *Mills* enunciated a new rule when it rejected, for the first time, the requirement of unanimity on a particular mitigating factor.

The Commonwealth also contends that the result in *Mills*, a 5-4 decision, was not a foregone conclusion and

"marked a significant leap from prior precedent." Appellees' Supp. Br. at 4. It notes that four present Supreme Court justices dispute that the *Mills* decision was "'controlled or governed' by *Lockett* and *Eddings*, let alone dictated by those earlier decisions." *Id.* at 9, citing *McKoy v. North Carolina*, 494 U.S. 433, 452-56 (1990) (Kennedy, J., concurring opinion); *id.* at 471 (Scalia, J., dissenting opinion, with Rehnquist, C.J., and O'Connor, J.).

The courts of appeals that have considered whether *Mills* announced a new rule have divided on their view. In *Gall v. Parker*, 231 F.3d 265, 322 (6th Cir. 2000), *cert. denied*, 533 U.S. 941 (2001), the Court of Appeals for the Sixth Circuit held that the rule in *Mills* was not new. The court explained that *Lockett* was firmly in place in 1981 when petitioner's conviction became final, and stated that a state court facing the petitioner's claim at that time would have felt compelled to apply *Lockett* as *Mills* ultimately did in 1988. *Id.* at 323. It further stated that *Mills* did not break new ground or impose a new obligation on the states or federal government. *Id. See also DeShields v. Snyder*, 829 F. Supp. 676, 687-88 (D.Del. 1993) (concluding *Mills* did not announce a new rule for *Teague* purposes).

Unlike the Sixth Circuit, the Court of Appeals for the Eighth Circuit concluded that *Mills* announced a new rule that does not apply retroactively on collateral review. In *Miller v. Lockhart*, 65 F.3d 676, 685-86 (8th Cir. 1995), the court held that the result in *Mills* was not dictated by prior cases and while *Lockett* may inform, control or govern *Mills*, *Lockett* did not compel the further holding that a unanimity requirement for mitigating circumstances is unconstitutional. The Court of Appeals for the Fifth Circuit reached the same conclusion in *Cordova v. Collins*, 953 F.2d 167, 173 (5th Cir.

1992), where the court stated that it was precluded by *Teague* from applying *Mills* retroactively.

I previously expressed my view that under the *Teague* analysis the Supreme Court would likely view *Mills* as announcing a new rule, and that it would not apply retroactively. *See Zettlemoyer v. Fulcomer*, 923 F.2d 284, 316-17 n.3 (3d Cir. 1991) (Sloviter, J., dissenting). Although I find the result reached by the majority attractive, and I agree that *Mills* followed logically from earlier cases, I regretfully cannot join the majority's view that *Mills* may be applied retroactively to Banks' case because *Mills* did not create a new rule for purposes of a *Teague* analysis.

My view is informed in large part by several decisions of the Supreme Court which, after analyzing *Teague*, characterized the rules at issue in those cases as new ones. In *Saffle v. Parks*, 494 U.S. 484 (1990), Parks, a habeas petitioner, claimed that a penalty phase jury instruction telling the jury to avoid any influence of sympathy violated his Eighth Amendment rights. Parks argued that jurors must be allowed to base their sentencing decision upon sympathy after hearing the mitigating evidence.

In concluding that the principle Parks advanced created a new rule under *Teague*, the Supreme Court held that *Lockett* and *Eddings* did not dictate such a result. *Id.* at 490. The Court explained that although the decisions in *Lockett* and *Eddings* limit the ability of a state to define the factual bases upon which the capital sentencing decision must be made, they do not speak to whether the state may instruct the sentencer to render its decision on the evidence without sympathy. *Id.* As the *Saffle* Court explained, "[t]here is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its

sentencing decision and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision." *Id.* Because it deemed the rule sought by Parks to be a new one, the Court did not consider the merits of Parks' proposed rule. The Commonwealth relies on the distinction made by the Supreme Court in *Saffle* between *what* mitigating evidence the jury must be allowed to consider as opposed to *how* it must consider the mitigating evidence. Appellees' Supp. Br. at 6.

Another application of the *Teague* new rule/existing rule distinction is found in *Butler v. McKellar*, 494 U.S. 407 (1990). In that case, a habeas petitioner sought the benefit of the holding in *Arizona v. Roberson*, 486 U.S. 675 (1988), that the police may not initiate questioning after the accused invokes his right to counsel in the context of a separate investigation. Butler argued that *Roberson* should be applied to his case because it did not establish a new rule under *Teague* but merely followed the rule established in *Edwards v. Arizona*, 451 U.S. 477 (1981), where the Court held the police must refrain from further questioning after the accused had invoked his right to counsel.

Butler noted that the Supreme Court had stated in *Roberson* that the case was directly controlled by *Edwards*. Nonetheless, the Court in *Butler* decided, in an approach consistent with that it took in *Saffle*, that *Roberson* announced a new rule because its result was not "dictated" by the *Edwards* precedent. 494 U.S. at 409. The Court explained that its outcome in *Roberson* was susceptible to debate among reasonable minds, as evidenced by the differing positions taken by judges of other courts. *Id.* at 415.

Thereafter, in *Graham v. Collins*, 506 U.S. 461 (1993), the Court once again focused on the meaning of the

statement in *Teague* that a new rule is one that was not "*dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301. Graham, the habeas petitioner, contended that the sentencing jury was unable to give effect to mitigating evidence of his age, background and character within the confines of the three special issues questions in the same Texas sentencing statute at issue in *Penry*. Although the Court in *Penry* had required instructions that the jury should consider mental retardation and childhood abuse as mitigating evidence, in *Graham* the Court held that the relief Graham sought, instructions that the jury consider age, background and character as mitigating, would require announcement of a new rule. *Id.* at 476-77. It stated that "the determinative question [under *Teague*] is whether reasonable jurists reading the case law that existed in 1984 could have concluded that Graham's sentencing was *not* constitutionally infirm." *Id.* Because it could not say, even with the benefit of the Court's decision in *Penry*, that reasonable jurists would be of one mind on Graham's claim, the ruling sought would be a new rule. The Court noted the limited issue before it in *Penry* and stated that it did not read *Penry* "as effecting a sea change in [the] Court's view of the constitutionality of the former Texas death penalty statute; it does *not* broadly suggest the invalidity of the special issues framework." *Id.* at 474. Thus, it rejected Graham's reliance on *Penry*. The language used in the *Graham* opinion reiterates the need to show the result was "commanded" by the earlier cases if it is not to be viewed as a new rule. *See id.* at 475; *see also Lambrix v. Singletary*, 520 U.S. 518, 528 n.3 (1997) (finding *Espinosa v. Florida*, 505 U.S. 1079 (1992) (per curiam), announced a new rule that was not dictated by precedent where earlier cases did not compel the outcome because they did not answer the definitive question before the Court).

Although *Mills* can be viewed as establishing an incremental step in the series of cases beginning with *Furman*, I believe it is not commanded by the earlier cases in the sense the Court approached that issue in *Saffle*, *Butler* and *Graham*. Hence, I conclude that *Mills* established a new rule within the *Teague* inquiry that does not apply retroactively, unless it falls within one of the two exceptions to *Teague*.

Those exceptions are narrow. The first exception, that for new rules that place "`certain kinds of primary, private individual conduct beyond the power of the criminal law- making authority to proscribe,'" *Caspari*, 510 U.S. at 396 (quoting *Teague*, 489 U.S. at 307), is plainly not applicable. The manner in which the jury must consider mitigating evidence does not relate to the "primary, private, individual conduct" underlying the offense at issue.

Banks contends that if *Mills* created a new rule, the second exception, that for "`watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding," *id.* (quoting *Saffle*, 494 U.S. at 495), applies but I cannot agree. The exception is meant to apply only to a small core of rules requiring observance of those procedures that are implicit in the concept of ordered liberty. *Graham*, 506 U.S. at 478 (citations omitted). The *Saffle* Court gave as an example of the type of rule falling within the second exception the rule enunciated in *Gideon v. Wainwright*, 372 U.S. 335 (1963), that a defendant has the right to be represented by counsel in all criminal trials for serious offenses. *See* 494 U.S. at 495. In *Teague*, itself, the Court gave as illustrations for the second exception the classic grounds for the issuance of a writ of habeas corpus -- that the proceeding was dominated by mob violence, that the prosecutor knowingly used perjured testimony or that a

conviction was based upon a confession obtained by brutal methods. *See Teague*, 489 U.S. at 313 (citations omitted).

No Supreme Court case since *Teague* has held the second exception applicable. For example, in *Sawyer v. Smith*, 497 U.S. 227, 245 (1990), the Supreme Court found that the rule in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), which held that the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere, does not satisfy the exception. The Court stated that the second exception would apply only to a new rule that, in addition to improving the accuracy of trial, "'alter[s] our understanding of the *bedrock procedural elements*'" essential to the fairness of a proceeding. 497 U.S. at 242 (citing *Teague*, 489 U.S. at 311 (citation omitted)). It further stated that it is "'unlikely that many such components of basic due process have yet to emerge.'" *Id.* at 243 (quoting *Teague*, 489 U.S. at 313).

Although I believe that the rule in *Mills* is aimed at improving the reliability of capital sentencing, in light of the Supreme Court's decisions in *Saffle*, *Butler*, and *Graham* I cannot conclude that *Mills* alters our understanding of the bedrock procedural elements essential to the fairness of a proceeding. Therefore, I reject Banks' argument that *Mills* falls within the second *Teague* exception.

II.

Notwithstanding my view that *Mills* created a new rule under *Teague* that does not fall within either of the *Teague* exceptions, I believe that *Teague* does not apply in the special circumstances under which the Pennsylvania

Supreme Court reviewed Banks' post-conviction petition. I note initially that in its opinion remanding to this court, the Supreme Court focused only on our failure to analyze the *Teague* issue and did not reach the merits of our holding in *Banks I* "that the Pennsylvania Supreme Court ruling involved an unreasonable application of *Mills*." *Banks v. Horn*, 271 F.3d 527, 545 (3d Cir. 2001). There would be no basis therefore to assume that the Court rejected that holding. But in light of my conclusion that *Mills* established a new rule, it is incumbent on me to explain why I believe we are free to apply *Mills* retroactively to Banks' case. The explanation lies in Pennsylvania's unique relaxed waiver rule in effect at the time of Banks' state post-conviction proceedings.

Banks' 1983 conviction of first degree murder and related crimes was affirmed by the Pennsylvania Supreme Court on direct appeal in 1987. *Commonwealth v. Banks*, 521 A.2d 1 (Pa.), *cert. denied*, 484 U.S. 873 (1987). When Banks appealed the trial court's 1993 denial of his petition for post-conviction relief to the Pennsylvania Supreme Court, he asserted, among other claims, that the jury instructions, jury poll and verdict slip violated *Mills* (decided after Banks' direct appeal was completed) by suggesting that the jury's findings as to mitigating circumstances must be unanimous. The Commonwealth argued that all of the issues raised in the post-conviction petition were waived because Banks failed to raise them on direct appeal. The Pennsylvania Supreme Court agreed that some of the issues could have been raised on direct appeal and thus could be deemed waived under the Post Conviction Relief Act, 42 Pa. Cons. Stat. §§ 9541-46 ("PCRA"), but stated that it would "address all of Appellant's claims since the trial court addressed all of those claims and since it is this Court's practice to address all issues arising in a death penalty case irrespective of a finding of waiver." *Commonwealth v. Banks*, 656 A.2d 467, 470 n.7 (Pa. 1995).

The first issue it addressed was Banks' claim that the jury instruction, jury poll and the verdict slip violated the Supreme Court's mandate in *Mills*.

The Pennsylvania Supreme Court considered the *Mills* claim on the merits. This was the first time it did so. It reviewed the jury instruction and found that it had determined in another case that the instruction, "which mirrors the language found in the death penalty statute of [the Pennsylvania] Sentencing Code," did not violate *Mills*. *Id.* at 470. It similarly held that the form of the verdict slip did not violate *Mills*, and that the answers provided by the jurors during the poll did not suggest that they believed unanimity was required in finding mitigating circumstances. *Id.*

A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied. *Caspari*, 510 U.S. at 390; *Kapral v. United States*, 166 F.3d 565, 572 (3d Cir. 1999). Although Banks' direct appeal technically had been exhausted, the Pennsylvania Supreme Court treated his petition for collateral relief like a direct appeal by considering his *Mills* claim on the merits. Because the Pennsylvania Supreme Court applied the relaxed waiver doctrine, Banks' conviction was not final within the meaning of *Teague* until the Pennsylvania Supreme Court affirmed the denial of his PCRA petition and his petition for a writ of certiorari was denied.

The *Teague* rule stems in large part from the desire to accord comity to decisions of the state courts, which, in their review of the case, did not have the opportunity to analyze the effect of a subsequent Supreme Court decision. The

rationale for the comity principle has been articulated most forcefully in the cases dealing with the exhaustion doctrine. More than a century ago, in *Ex parte Royall*, 117 U.S. 241, 251 (1886), the Supreme Court wrote that as a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act.

After Congress' 1948 codification of the exhaustion doctrine at 28 U.S.C. § 2254, the Supreme Court in *Rose v. Lundy*, 455 U.S. 509 (1982), analyzed the policies underlying the statute as follows:

> The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. [citation omitted]. Under our federal system, the federal and state `courts [are] equally bound to guard and protect rights secured by the Constitution.' [citation omitted]. Because `it would be unseemly in our dual system of government for a federal district court to upset a state court conviction *without an opportunity to the state courts to correct a constitutional violation*,' federal courts apply the doctrine of comity, which `teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.' [citations omitted].

Id. at 518 (emphasis added).

More recently, in *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999), where the Court held that a state prisoner

must present his claims to a state supreme court in a petition for discretionary review in order to satisfy the exhaustion requirement, the Court explained that the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts. It further stated, citing *Rose*,

> State courts, like federal courts, are obliged to enforce federal law. Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief. [citations omitted]. This rule of comity reduces friction between the state and federal court systems by avoiding the 'unseem[liness]' of a federal district court's overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance. [citations omitted].

Id. at 844-45. *See also Duncan v. Walker*, 533 U.S. 167, 178-79 (2001) (recognizing principle of comity set forth in *O'Sullivan* and *Rose*). We also have recognized the same rationale. *See Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000), *cert. denied*, 532 U.S. 980 (2001).

In this case, because of the application of Pennsylvania's unique relaxed waiver doctrine in capital cases, the Pennsylvania Supreme Court not only had the first opportunity to review Banks' jury instructions, verdict slip, and jury poll in light of *Mills*, but exercised that opportunity. It thus treated that claim as on direct appeal and there is no reason why, even though *Mills* announced a new rule, the

Pennsylvania Supreme Court's resolution of that issue should not be cognizable on federal habeas review. I adhere to the majority's judgment in our decision filed October 31, 2001 that the Pennsylvania Supreme Court's ruling denying Banks' claim under *Mills* was unreasonable. Therefore, I concur in its judgment today.[3]

A True Copy:
Teste:

Clerk of the United States Court of
Appeals for the Third Circuit

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[3] The unique circumstances presented by this case are unlikely to recur because the Pennsylvania Supreme Court now strictly construes the state's Post Conviction Relief Act. In *Commonwealth v. Albrecht*, 720 A.2d 693, 700 (Pa. 1998), the Pennsylvania Supreme Court abandoned its application of a relaxed waiver doctrine in capital cases in PCRA appeals because the "ever-widening application of the doctrine has, in effect, virtually eliminated any semblance of finality in capital cases, and frustrated the efficient use of the resources of the court." Since *Albrecht*, the Pennsylvania Supreme Court has ruled that claims of trial court error, like the *Mills* claim in the present case, are not reviewable on collateral review. *See, e.g., Commonwealth v. Wallace*, 724 A.2d 916, 921 n.5 (Pa. 1999) (finding claims of trial court error that could have been raised on direct review waived). It has also rejected the argument that the abrogation of the relaxed waiver rule should not apply retroactively to PCRA petitions filed before *Albrecht* was issued. *See Commonwealth v. Bracey*, 795 A.2d 935, 941 (Pa. 2001) (because *Albrecht* merely clarified the court's practice of relaxing its waiver rules in death penalty cases, the defendant suffered no constitutional violation by its retroactive application).

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

August 26, 2002

Mr. Scott C. Gartley
200 North River Street
Wilkes-Barre, PA 18711

Re: Martin Horn, Commissioner, Pennsylvania Department of Corrections, et al.
v. George E. Banks
No. 01-1385

Dear Mr. Gartley:

The Court today entered the following order in the above entitled case:

The petition for rehearing is denied.

Sincerely,

/s/
William K. Suter, Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

August 5, 2002

Mr. Scott C. Gartley
Assistant Dist. Attorney
200 North River Street
Wilkes-Barre, PA 18711

Re: George E. Banks
v. Martin Horn, Commissioner, Pennsylvania Department of Corrections, et al.
No. 01-8875

Dear Mr. Gartley:

The Court today entered the following order in the above entitled case:

The petition for rehearing is denied.

Sincerely,

/s/
William K. Suter, Clerk

SUPREME COURT OF THE UNITED STATES

No. 01-1385

MARTIN HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.,
Petitioners

v.

GEORGE S. BANKS

ORDER ALLOWING CERTIORARI. Filed June 17, 2003.

The petition herein for writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

SUPREME COURT OF THE UNITED STATES

No. 01-1385

MARTIN HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.,
Petitioners

v.

GEORGE S. BANKS

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Third Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court is reversed, and the case is remanded to the United States Court of Appeals for the Third Circuit for further proceedings in conformity with the opinion of this Court.

June 17, 2002

SUPREME COURT OF THE UNITED STATES

MARTIN HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* GEORGE E. BANKS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 01-1385. Decided June 17, 2002

PER CURIAM.

The Court of Appeals for the Third Circuit granted respondent federal habeas corpus relief from his death sentence. 271 F.3d 527 (2001). Applying the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) standard of review,[1] the Court of Appeals concluded that the Pennsylvania Supreme Court had unreasonably applied federal law in evaluating respondent's claim that his penalty phase jury instructions and verdict forms were improper under *Mills v. Maryland*, 486 U.S. 367 (1988). The Court of Appeals found it unnecessary to evaluate whether *Mills* applies retroactively to cases on habeas review per *Teague v. Lane*, 489 U.S. 288

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[1] Title 28 U.S.C. §2254(d) was modified by AEDPA and now provides, in part, that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

(1989), because the Pennsylvania Supreme Court had not ruled on retroactivity. 271 F.3d, at 541-543. In avoiding the *Teague* issue, the Court of Appeals directly contravened *Caspari v. Bohlen*, 510 U.S. 383 (1994), in which we held that federal courts must address the *Teague* question when it is properly argued by the government. We thus grant the petition for a writ of certiorari and reverse the Court of Appeals' determination that a *Teague* analysis was unnecessary.[2]

Respondent, George Banks, was convicted of 12 counts of first-degree murder stemming from a series of shootings on September 25, 1982. During the penalty phase of his trial, the jury was instructed, in part:

> "The sentence you impose will depend upon your findings concerning aggravating and mitigating circumstances. The Crime[s] Code in this Commonwealth provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances." *Commonwealth v. Banks*, 540 Pa. 143, 150, 656 A.2d 467, 470 (1995).

In relevant part, the verdict form required the jury to check a box indicating that "[w]e the jury have found unanimously" either "[a]t least one aggravating circumstance and no mitigating circumstances," or "[o]ne or more aggravating circumstances which outweigh any mitigating circumstance or circumstances." 271 F.3d, at 549-550. The jury marked the

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[2] We also grant respondent's motion for leave to proceed *in forma pauperis*.

latter box, and also checked two other boxes indicating the aggravating circumstance (multiple offenses punishable by at least life in prison) and mitigating circumstance (extreme mental or emotional disturbance) that it had found. Respondent was sentenced to death on each count of first-degree murder.

After respondent's direct appeal was denied, we decided *Mills*, in which we held that the Constitution prohibits a state from requiring jurors unanimously to agree that a particular mitigating circumstance exists before they are permitted to consider that circumstance in their sentencing determination. 486 U.S., at 374. Subsequently, in state postconviction proceedings, respondent raised a *Mills* challenge to the jury instructions and verdict forms in his case, arguing that they improperly "suggested to the jury that its findings as to mitigating circumstances must be unanimous." 450 Pa., at 149, 656 A.2d, at 470. The Pennsylvania Supreme Court rejected his claim: "[B]oth the verbal instructions given by the court as well as the instructions printed on the verdict slips were correct and not impermissibly suggestive of a unanimity requirement with respect to mitigating circumstances." *Id.*, at 153, 656 A.2d, at 471.

Respondent petitioned for federal habeas relief, which the United States District Court for the Middle District of Pennsylvania denied. 63 F. Supp. 2d 525 (1999). The District Court rejected respondent's *Mills* claim on the merits, applying the AEDPA standard of review articulated in 28 U.S.C. §2254(d): "Supreme Court precedent . . . did not require an outcome contrary to that reached by the state courts." 63 F. Supp. 2d, at 544. Because the court found the AEDPA standard of review dispositive, it did "not address the parties' arguments concerning the retroactivity of *Mills*." *Ibid.*

The Court of Appeals for the Third Circuit reversed the District Court in part, granting respondent relief from his death sentence under *Mills*. The Court of Appeals first asked: "Are we compelled to conduct a retroactivity analysis under *Teague*?" 271 F.3d, at 541. It recognized that, per *Teague*, retroactivity is a "'threshold question,'" but it found "*Teague* not to govern [its] analysis" in this case because "we do not need to focus on anything other than the reasoning and determination of the Pennsylvania Supreme Court," which had not ruled on retroactivity. 271 F.3d, at 541, and n. 13.[3] It rejected petitioners' contention that the state court's failure to rule on retroactivity was irrelevant to whether *Teague* should apply in federal court:

> "*Teague* teaches that the federal courts in habeas proceedings should be reluctant to apply new rules of federal jurisprudence in state court cases decided before such new rules were handed down. Principles of comity and finality counsel that we maintain a circumscribed scope of habeas review. . . . Here, however, as we have noted, the Pennsylvania Supreme Court applied *Mills*. We are examining the application of *Mills*, not because we wish to impose a new rule not considered by the Pennsylvania Supreme Court, but as the court in fact *did* consider and apply it. In such a situation, *Teague* is not implicated. Accordingly, we need ask only whether the

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[3] In deciding not to conduct a *Teague* analysis, the Court of Appeals "acknowledge[d] further that the Pennsylvania Supreme Court has specifically noted its skepticism regarding the retroactive application of *Mills*" and has disagreed with the Court of Appeals' resolution of *Mills* claims similar to respondent's. 271 F.3d, at 542.

> Pennsylvania Supreme Court's application of *Mills* should be disturbed under the AEDPA standards." 271 F.3d, at 543 (citation omitted).

Freed from performing a *Teague* analysis concerning *Mills*' retroactivity, a question which has created some disagreement among the Federal Circuits,[4] the Court of Appeals asked "whether the Pennsylvania Supreme Court determination regarding the constitutionality of the instructions, verdict slip, and polling of the jury involved an unreasonable application of *Mills*." 271 F.3d, at 544. It then found the state court's application of federal law unreasonable under the standards of 28 U.S.C. §2254(d), relying on both *Mills* and *Boyde v. California*, 494 U.S. 370 (1990). 271 F.3d, at 551. The Court of Appeals explained that, "[c]onsidered as a whole, the jury instructions leave no doubt that 'there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.'" *Id.*, at 549 (quoting *Boyde*, *supra*, at 380).

Petitioners seek a writ of certiorari, arguing that the Court of Appeals erred by not performing a *Teague* analysis, by applying *Mills* retroactively to respondent's case, and by concluding that the state court's decision was unreasonable under *Mills*. We find it unnecessary to resolve the latter two of these claims, because we determine that the Court of

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[4] Compare *Gall v. Parker*, 231 F.3d 265, 322 (CA6 2000) (*Teague* does not bar retroactive application of *Mills*), and *Williams v. Dixon*, 961 F.2d 448, 456 (CA4 1992) (same), with *Miller v. Lockhart*, 65 F.3d 676, 685-686 (CA8 1995) (*Teague* bars retroactive application of *Mills*), and *Cordova v. Collins*, 953 F.2d 167, 173 (CA5 1992) (same).

Appeals committed a clear error by failing to perform a *Teague* analysis.

In *Teague*, we explained that "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S., at 310.[5] And in *Caspari*, we held that "[a] threshold question in every habeas case, therefore, is whether the court is obligated to apply the *Teague* rule to the defendant's claim. . . . [A] federal court may, but need not, decline to apply *Teague* if the State does not argue it. But if the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court *must* apply *Teague* before considering the merits of the claim." 510 U.S., at 389 (citations omitted). Here, petitioners raised the *Teague* issue both in the District Court, see 63 F. Supp. 2d, at 544, and in the Court of Appeals, see 271 F.3d, at 542-543. Thus, per *Caspari*, a case not cited in the opinion below, it was incumbent upon the Court of Appeals to perform a *Teague* analysis before granting respondent relief under *Mills*. The Court of Appeals erred in concluding that it did "not need to focus on anything other than the reasoning and determination of the Pennsylvania Supreme Court." 271 F.3d, at 541.

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[5] We have recognized two exceptions to *Teague*'s rule. "The first exception permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the State to proscribe, . . . or addresses a 'substantive categorical guarante[e] accorded by the Constitution,' such as a rule 'prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" *Saffle v. Parks*, 494 U.S. 484, 494 (1990) (citations omitted). "The second exception is for 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.*, at 495.

Although the Court of Appeals may have simply over-looked *Caspari*, its opinion can also be read to imply that AEDPA has changed the relevant legal principles articulated in *Caspari*, see 271 F.3d, at 541, n. 13 ("We note, however, that recent decisions have called into question to what extent *Teague* has continued force independent of AEDPA"). While it is of course a necessary prerequisite to federal habeas relief that a prisoner satisfy the AEDPA standard of review set forth in 28 U.S.C. §2254(d) ("[a]n application . . . shall not be granted . . . *unless*" the AEDPA standard of review is satisfied (emphasis added)), none of our post-AEDPA cases have suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard, or that AEDPA relieves courts from the responsibility of addressing properly raised *Teague* arguments. To the contrary, if our post-AEDPA cases suggest anything about AEDPA's relationship to *Teague*, it is that the AEDPA and *Teague* inquiries are distinct. *See, e.g., Tyler v. Cain*, 533 U.S. 656, 669-670 (2001) (O'CONNOR, J., concurring) (construing successive application provisions of AEDPA, 28 U.S.C. §2244(b)(2)(A)); *Williams v. Taylor*, 529 U.S. 362, 412-413 (2000) (construing §2254(d)). Thus, in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state.

We reverse the Court of Appeals' holding that "*Teague* is not implicated" by this case, 271 F.3d, at 543, and remand for further proceedings consistent with this decision.

It is so ordered.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

May 28, 2002

Mr. Scott C. Gartley
Assistant Dist. Attorney
200 North River Street
Wilkes-Barre, PA 18711

Re: George E. Banks
v. Martin Horn, Commissioner, Pennsylvania Department of Corrections, et al.
No. 01-8875

Dear Mr. Gartley:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/
William K. Suter, Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 99-9005

GEORGE E. BANKS,
Appellant

v.

MARTIN HORN, Commissioner, PA Dept of Corrections; JAMES PRICE, Superintendent of State Correctional Institute Greene; RAYMOND J. COLLERAN, Superintendent State Correctional Institute Waymart; COMMONWEALTH OF PENNSYLVANIA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 99-cv-00438)
District Judge: Honorable James F. McClure, Jr.

Present: BECKER, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, and FUENTES,
Circuit Judges

SUR PETITION FOR REHEARING *EN BANC*

The Appellees' Petition for Rehearing *En Banc* and Brief *Amicus Curiae* in support thereof having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is hereby DENIED. Chief Judge Becker would have granted rehearing.

BY THE COURT:

/s/ Marjorie O. Rendell
Circuit Judge

Dated: DEC 11 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 99-9005

GEORGE E. BANKS,
Appellant

v.

MARTIN HORN, Commissioner, PA Dept of Corrections; JAMES PRICE, Superintendent of State Correctional Institute Greene; RAYMOND J. COLLERAN, Superintendent of State Correctional Institute Waymart; COMMONWEALTH OF PENNSYLVANIA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 99-cv-00438)
District Judge: Honorable James F. McClure, Jr.

Argued April 2, 2001
Before: SLOVITER, ROTH and RENDELL, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Middle District of

Pennsylvania and was argued on April 2, 2001. On consideration whereof, it is now here

ORDERED and ADJUDGED by this court that Banks' sentence, as set forth in the Judgment and Commitment Order of the District Court entered on September 16, 1999, be and the same is hereby VACATED and the case is REMANDED for resentencing. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/
Marcia M. Waldron, Clerk

Dated: OCT 31 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 99-9005

GEORGE E. BANKS,
Appellant

v.

MARTIN HORN, Commissioner, PA Dept of Corrections; JAMES PRICE, Superintendent of State Correctional Institute Greene; RAYMOND H. COLLERAN, Superintendent of State Correctional Institute Waymart; COMMONWEALTH OF PENNSYLVANIA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 99-cv-00438)
District Judge: Honorable James F. McClure, Jr.

Argued April 2, 2001

Before: SLOVITER, ROTH and RENDELL, Circuit Judges

(Filed: October 31, 2001)

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OPINION OF THE COURT

RENDELL, Circuit Judge.

George Banks was convicted by a Luzerne County, Pennsylvania jury of having committed thirteen murders, and

was sentenced to death. His direct appeals and filings under the Pennsylvania Post-Conviction Relief Act ("PCRA") failed. He sought habeas corpus relief in the District Court under 28 U.S.C. § 2254, which was denied. He comes before us now to appeal the District Court's ruling.

We have jurisdiction over this appeal pursuant to 28 U.S.C. §§ 1291 and 2253. The District Court granted a certificate of appealability as to whether the sentencing phase instructions and forms violated *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), under our precedent in *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997), *cert. denied*, 524 U.S. 911, 118 S.Ct. 2076, 141 L.Ed.2d 151 (1998). By order entered June 27, 2000, we agreed to expand the certificate of appealability to include the issue of whether Banks failed to make a knowing, intelligent, and voluntary waiver of his Sixth Amendment right to counsel.

Because Banks's habeas corpus petition was filed after April of 1996,[1] the role of the District Court in reviewing the state court proceedings was governed by AEDPA.[2] Accordingly, the District Court's task was to determine whether the state court's decision was either contrary to

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[1] We discuss our view of the applicability of AEDPA specifically at 9-10, *infra*.

[2] 28 U.S.C. § 2254(d) states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(Continued)

or an unreasonable application of Supreme Court precedent. The District Court found no basis on which to dispute the state court's ruling. Because the question of whether the District Court appropriately applied the AEDPA standard of review is a question of law, we review its conclusions in that regard de novo. *Berryman v. Morton*, 100 F.3d 1089,1095 (3d Cir. 1996).

A. DISCUSSION

On September 25, 1982 in Wilkes-Barre, Pennsylvania, Banks shot fourteen people with a Colt AR 15 semi-automatic rifle, killing thirteen and wounding one. The AR-15 is a civilian version of the military's M-16 rifle. Banks began his deadly spree at his own home, where he shot and killed three of his girlfriends and their five children, four of whom Banks himself had fathered. Banks then left his home clad in what appeared to be military fatigues. On the street outside he happened upon a group of bystanders who had heard the shots. Banks shot and killed one, a young man who had recognized him, and also shot and seriously wounded another. Banks then carjacked a car and drove to a trailer park, where he shot another girlfriend, their son, a second boy, and the girlfriend's mother. Two other boys survived the attack. After a stand-off at a friend's house, Banks surrendered.

At trial, the defense offered psychiatric experts who testified that Banks, who is bi-racial, suffered from paranoid

(Continued)

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

psychosis and was convinced that he was a victim of a racist conspiracy. The theory was offered that he killed his children to save them from suffering racism as he had. Banks testified on his own behalf and insisted on referring to graphic, gruesome pictures of the murders to try to show that there was a government conspiracy against him. Banks alleged that his shots had only wounded, not killed, some of the victims, and that the police had fired the lethal shots, after which some of the bodies were moved. He also alleged that the medical examiner covered up some wounds and enlarged or altered others to distort the information presented to the jury. He sought throughout the trial to exhume the bodies.

Banks was convicted by a state court jury of twelve counts of first degree murder, one count of third degree murder, criminal attempt to commit murder, two counts of recklessly endangering another person, robbery and theft by unlawful taking or disposition. In the penalty phase, the jury sentenced Banks to death and imprisonment.

Banks filed direct appeals and sought collateral relief in the state courts, as well as filing for federal habeas corpus relief. We need not detail all these proceedings, except that one aspect of the procedural posture of the case deserves attention. The government had argued to the District Court that Banks's habeas corpus petition was not filed in a timely manner. Under AEDPA, Banks was required to file his petition within one year of April 24, 1996, unless the deadline was tolled during the time a "properly filed" state petition for relief was pending. The government contended that because Banks's state court PCRA petition was filed late, it should not be deemed to have been "properly filed" for purposes of the tolling provisions under the federal statute. *See* 28 U.S.C. § 2244(d)(2). The government based its argument in part on *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998)

("We believe that a 'properly filed application' is one submitted according to the state's procedural requirements, such as the rules governing the time and place of filing.").

The government relied on the Pennsylvania Supreme Court's ruling in 1999 that the requirement for timely filing was "jurisdictional," rather than merely a statute of limitations. *See Commonwealth v. Banks*, 556 Pa. 1, 726 A.2d 374, 376 (1999) ("*Banks VI*"). The District Court did not accept that argument, however, noting that Banks could not be said to have been on notice prior to the Pennsylvania Supreme Court's holding in *Banks VI* that the Commonwealth would consider § 9545(b) to be jurisdictional, and that, especially in light of relaxed waiver in capital cases, and the policy of equitable tolling, Banks should not be barred because he reasonably could have construed the time requirement as procedural only. *See Banks v. Horn*, 63 F.Supp.2d 525, 533-34 (M.D. Pa. 1999) ("*Banks VIII*"). The District Court noted that since the exceptions allowed courts to hear some untimely petitions, not every provision in the statute could be jurisdictional, and, absent clear jurisdictional language, it is "entirely reasonable to conclude that § 9545(b) is a statute of limitations rather than a jurisdictional provision." *Id.* at 533. In *Banks VI*, the Pennsylvania Supreme Court cited to its decision in *Commonwealth v. Peterkin*, 554 Pa. 547, 722 A.2d 638 (1998), *petition for habeas corpus dismissed sub nom. Peterkin v. Horn*, 34 F.Supp.2d 289 (E.D. Pa. 1998), which states simply that the "General Assembly amended the PCRA to require that, as a matter of jurisdiction, a PCRA petition must be filed within one year of judgment," but the statement was not the court's holding, and the court did not elaborate on the reasoning underlying its conclusion. *Peterkin*, 722 A.2d at 641. *Banks VI* was the first time the Pennsylvania Supreme Court held that a court was deprived of jurisdiction when the deadline was not met. As

the District Court noted, by concluding that the time limitation was jurisdictional, the Pennsylvania Supreme Court thought it was foreclosed from applying the relaxed waiver standard in Banks's case. 63 F.Supp.2d at 533.

Banks argues that, quite apart from the issue of how the "properly-filed" requirement of 28 U.S.C. § 2244(d)(2) is construed, we should consider his habeas petition as properly before us. First, he urges that because his first petition was filed pre-AEDPA he is not bound by AEDPA's provisions. In the alternative, he takes the position that the issue of timeliness of his habeas petition is not even before us on appeal since the government has not challenged the District Court's ruling in its counterstatement of issues, and has failed to discuss the issue in its brief, except for its conclusory reference to its position in a footnote.

Banks argues that his habeas petition was timely because it was not governed by AEDPA's one-year limitation period, but, rather, by pre-AEDPA law. In support of this theory, Banks urges that the habeas petition he filed in the District Court after AEDPA merely reasserted claims previously filed pre-AEDPA, so that it "relates back to the original filing date of Banks' pre-AEDPA petition." We disagree. The applicability of AEDPA does not turn upon a comparison of claims in successive petitions. It is, rather, governed solely by the date of the petition's filing. *See, e.g., Hull v. Kyler*, 190 F.3d 88, 103 (3d Cir. 1999); *Jones v. Morton*, 195 F.3d 153, 160-61 (3d Cir. 1999). Any petition that is filed subsequent to AEDPA is governed by AEDPA standards. In his argument, Banks relies on *Coss v. Lackawanna Cty. Dist.*

Atty., 204 F.3d 453 (3d Cir. 2000).[3] But *Coss* involved a unique factual setting in which Coss's petition was pending pre-AEDPA, and while it was pending, Coss filed another petition solely to *remove* the claims that the district court had held unexhausted. We thus viewed the second petition as "tantamount to a further amendment or clarification to the initial petition, filed at the direction of the District Court. . . ." 204 F.3d at 461. We were addressing the merits of his pre-AEDPA petition. If, instead, Coss's petition had been dismissed, and he had then filed either an identical petition or a petition absent the unexhausted claims after AEDPA's effective date, we would have been compelled to find that AEDPA controlled. Once a petition has been dismissed, a subsequent petition is a new petition and is governed by AEDPA.

As to Banks's contention that the issue as to whether his petition is time-barred is not before us because of the government's failure to specifically raise and brief the issue by way of cross-appeal, we believe that, in light of the District Court's careful analysis of this issue and its importance, and because the government did make reference to the issue albeit in a footnote -- we should examine whether the statutory filing requirements were met. *Silber v. United States*, 370 U.S. 717, 717-18, 82 S. Ct. 1287, 8 L.Ed.2d 798 (1962).[4]

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[3] The Supreme Court reversed and remanded on grounds not at issue here. *See Lackawanna Cty. Dist. Atty. v. Coss*, 531 U.S. 923, 121 S.Ct. 297, 148 L.Ed.2d 238 (2000).

[4] Even if not raised, we believe we could consider this issue sua sponte. "While ordinarily we do not take note of errors not called to the attention of the Court of Appeals nor properly raised

(Continued)

Should Banks's second state court PCRA filed in January 1997 be deemed properly filed such that the one-year AEDPA filing requirement did not begin to run until the Pennsylvania Supreme Court finally ruled on it in March 1999? If so, then Banks's habeas petition was filed in time. If not, then we need to decide whether the AEDPA one-year period barred his petition or whether it should be equitably tolled.[5]

It seems clear that, technically, Banks's filing of his second PCRA in January 1997 was too late under Pennsylvania law. This is because the Pennsylvania legislature had enacted legislation in November 1995 requiring all petitions, including second or successive petitions, to be filed within one year of the final order on direct appeal unless

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(Continued)

here, that rule is not without exception. The Court has `the power to notice a `plain error' though it is not assigned or specified,' . . . `In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *Silber*, 370 U.S. 717-18, 82 S.Ct. 1287, 8 L.Ed.2d 798 (internal citations omitted). *See also Acosta v. Artuz*, 221 F.3d 117 (2d Cir. 2000); *Kiser v. Johnson*, 163 F.3d 326 (5th Cir. 1999).

[5] We note that the Supreme Court's recent ruling in *Duncan v. Walker* does not bear on this issue because here, unlike the situation in *Duncan*, the time period was violated unless there is equitable tolling for the state proceedings, even if the time during which Banks's first federal habeas petition was pending is taken into account. 533 U.S. 167, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001).

certain exceptions were met.[6] 42 Pa.Cons.Stat. § 9545 (Act of November 17, 1995, Special Session No. 1 P.L. 1118, No. 32, effective in 60 days).

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[6] The text of the relevant statutory provision is:

(B) TIME FOR FILING PETITION.--

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States; (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

(3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.

However, was the petition therefore necessarily not "properly filed"? While we could explore this concept under the applicable Pennsylvania law and under the federal habeas case law, *see, e.g., Artuz v. Bennett*, 531 U.S. 4, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000), we need not do so, because we conclude that, even were we to decide that the late filing of Banks's second PCRA rendered it not "properly filed," the District Court appropriately called on equitable principles to toll the one-year AEDPA requirement given this unusual fact pattern. Here, as the District Court points out, the state of the Pennsylvania law regarding the nature of the filing requirement was unclear, and Banks could reasonably have viewed the state time limit as a mere statute of limitations subject to equitable tolling, not, as the Pennsylvania Supreme Court later held in *Banks VI*, a jurisdictional requirement. The District Court noted that viewing this later ruling as a bar would result in unfair forfeiture without notice. *Banks VIII* at 534. This circumstance provides a basis for us to call on equitable principles in application of *our own* federal time parameters -- the one-year AEDPA requirement.

We have recently had occasion to examine this issue. In *Fahy v. Horn*, we described the state of the law at the time of Fahy's fourth PCRA petition, which was also the time period when Banks's petition was pending, as "inhibitively opaque." 240 F.3d 239 (3d Cir. 2001), *cert. denied*, ___ U.S. ___, 122 S.Ct. 323, ___ L.Ed.2d ___ (2001). We noted that in *Banks*, we had required Banks to return to state court because even *we* believed the relaxed waiver rule might well apply. How can we expect Banks to have predicted the ultimate ruling of the Pennsylvania Supreme Court when *we* could not?

In *Fahy* we stated:

> When state law is unclear regarding the operation of a procedural filing requirement, the petitioner files in state court because of his or her reasonable belief that a § 2254 petition would be dismissed as unexhausted, and the state petition is ultimately denied on these grounds, then it would be unfair not to toll the statute of limitations during the pendency of that state petition up to the highest reviewing state court.

Fahy v. Horn, 240 F.3d at 245.

The same rule applies here. The Pennsylvania Supreme Court had denied Banks's first PCRA petition in March 1995, and he had filed his first habeas petition in February 1996. Thus, his federal action was pending when AEDPA was passed in April 1996. Because the district court determined that Banks's claims could be adjudicated and the petition was not subject to dismissal as mixed, it was not until the Third Circuit reversed that determination and ordered the petition dismissed as mixed in September 1997 that it would be equitable to begin calculating a delay in filing against Banks, and because he filed his second PCRA petition while the appeal was still pending, there was no delay whatsoever. Subsequently, here, as in *Fahy*, Banks did not delay in seeking federal relief, filing his habeas petition two weeks after his state collateral proceedings were concluded. Thus, the equities are in his favor. Not only is there "no evidence of abuse of the process" by Banks, but it seems as clear as in Fahy's case that he "diligently and reasonably asserted his claims." *Id.* at 244-45. Accordingly, we conclude that the District Court was quite correct in its resort to equitable principles, and properly entertained Banks's petition on its merits, as we will as well.

B. ISSUES ON APPEAL

We granted Banks a Certificate of Appealability regarding two issues:

(1) Banks contends that the trial court erred in not having explored whether he was making a knowing, voluntary and intelligent waiver of his right to counsel during the trial. However, the District Court concluded that, by pursuing his own strategy at trial, Banks's situation was one of hybrid representation, but that there was no clear requirement under either United States Supreme Court precedent, nor under our case law, that a defendant "is entitled to an inquiry by the trial court before it exercises its discretion to permit hybrid representation." *Banks VIII*, 63 F.Supp.2d at 543.

(2) Banks contends that the jury instructions and verdict sheets during the penalty phase violated *Mills v. Maryland*, and the Pennsylvania Supreme Court unreasonably applied the Supreme Court precedent in finding that his death sentence was not constitutionally infirm.[7] The District Court rejected Banks's challenge, reasoning that it was to evaluate whether *Mills* applied only to Banks's trial and

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[7] The District Court had granted a certificate regarding the *Mills* issue and we enlarged it to include the Sixth Amendment issue. *Ouska v. Cahill-Masching*, 246 F.3d 1036, 1045 (7th Cir. 2001). The Third Circuit's Local Appellate Rules provide: "If the district court grants a certificate of appealability as to only some issues, the court of appeals will not consider uncertified issues unless petitioner first seeks, and the court of appeals grants certification of additional issues." 3d Cir. R. 22.1(b).

We note that the issue of Banks's competency to stand trial was previously litigated on appeal and is not before us.

direct appeal, and concluded that it did not, since Banks's conviction became final before *Mills* was decided and *Mills* has not been made retroactive by the United States Supreme Court. The District Court further distinguished our holding in *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997), reasoning that *Frey* involved a pre-AEDPA petition. *Id.* at 543-44.

We will address these issues in turn.

(1) Waiver of Representation of Counsel

Banks urges that the trial court should have conducted a colloquy with him, establishing that he knowingly and voluntarily waived his right to counsel before allowing Banks to engage in certain conduct during the trial, contrary to the advice of his counsel. Banks was represented throughout the proceeding, but he contends that he took over certain "core functions" at times, such that a colloquy was required.

Clearly, Banks and his counsel disagreed as to whether he should testify, and as to the scope of the testimony. Banks wanted to testify because he believed that it was critical for him to expose the conspiracy that he urged resulted in the deaths and in altered injuries to those he was accused of killing. During his testimony, therefore, Banks introduced the coroner's reports and photographs that had been ruled inadmissible prior to trial. Although counsel and the trial court warned Banks that the pictures were inflammatory, and that his testimony about the pictures and his showing them to the jury would allow the prosecutors to use them as well, Banks insisted that he was "forced into this," and that the pictures were "part of my evidence to the fact that they've twisted everything around."

Banks also, and again contrary to the advice of counsel, insisted that the medical examiners be questioned about details and supposed inconsistencies in the photographs. The colloquy between counsel and the trial court before the recall of one of the medical examiners is telling:

> Defendant: [T]hey're asking me to do the questioning. I prefer not to, because I'm not qualified to do it.
>
> The Court: Then I will ask you to consult with counsel and I will ask counsel to prepare and ask the questions.
>
> [Defense counsel]: Your Honor, the three of us have reviewed this, and we can't conceive of any questions to ask the doctor.
>
> The Court: Mr. Banks will discuss with you the questions he proposes to ask, and I think counsel should ask the questions.

Banks himself also cross-examined a deputy coroner and a police officer.

There is no question that the defendant's testimony and the introduction of the previously excluded photographs were, as the Court predicted, inflammatory. There is also no question that the testimony, the introduction of the photographs, and the examinations of the witnesses were contrary to the advice of counsel, and eroded the protections counsel had secured for Banks prior to trial. We note that the trial court warned Banks repeatedly of his need to adhere to the rules of the court and insisted that where the rules of evidence and procedure were concerned it would "treat [Banks] like a lawyer," and that one could infer from the court's

phrasing that Banks was to some extent acting as his own counsel. At no point, however, did Banks request that counsel withdraw and that he be allowed to proceed pro se.

The issue that Banks has presented to us is whether, even absent an affirmative declaration of a desire to proceed pro se, his actions were so contrary to counsel's advice and involved such significant control over his defense as to render him effectively unrepresented, and whether, if we so find, the trial court should have concluded that Banks was effectively proceeding pro se and should have conducted a Sixth Amendment waiver inquiry before allowing Banks to testify. The issue that we must actually resolve, however, is much more circumscribed, because of the scope of review under AEDPA. That is to say, our analysis is limited to whether the court failed to apply, or misapplied, clearly established U.S. Supreme Court precedent. The first step in our analysis, therefore, is to define whether any U.S. Supreme Court precedent mandated -- either directly or by extension to these facts -- that the trial court personally ensure that Banks was making a voluntary, intelligent, and knowing waiver of his Sixth Amendment right to counsel in a setting such as this. We note that the trial court did discuss certain rights with Banks before he testified:

> Mr. Banks, once again, I will preface my remarks by saying this is not a lecture. This is a responsibility I have as a trial judge, to be assured that you understand the rights that you have and the rights, by testifying, that you'll give up.

In the course of this discussion, the court advised Banks that he had a right not to testify and that he could be prejudiced if he disregarded counsel's advice by his testimony and by introducing exhibits as part of his testimony.

But the court never specifically inquired as to a waiver by Banks of his Sixth Amendment right to counsel:

> You understand, do you not, that the procedure is that counsel ask questions? May I suggest to you then that I will give you some time. You will consult with your counsel, so that you may give them the questions, so that they can properly phrase them for you.
>
> Let me caution you on another matter that might come up. You understand if you propose to use any exhibits, that you will be required to comply with the rules of evidence concerning exhibits.

The court did inquire whether Banks understood that he was not required to testify, that he had a constitutional right to remain silent, and that by testifying he would give up the right to remain silent. When Banks asked if he could continue to rely on the Fifth Amendment, the court explained to him that he could not, assuring Banks that "I don't want you to do anything that will harm you." The court further explained that the testimony might open avenues for questioning that would otherwise remain closed and urged Banks to follow counsel's advice. Throughout the discussion, Banks remained adamant that he wanted to testify. Thus, in evaluating the case law we are not assessing the quality of the inquiry made by the trial court, but only whether an inquiry specific to the waiver of counsel was mandated.

The two Supreme Court opinions referenced by the parties, *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), and *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), *reh'g denied*, 465 U.S. 1112, 104 S.Ct. 1620, 80 L.Ed.2d 148, address situations that are different from the case before us, not only on

the facts, but also on the principles that informed the Court's decisions. *Faretta* recognizes that a defendant who indicates a desire to represent himself and proceed without counsel has the right to do so, as long as he knowingly and intelligently waives his right to counsel. The defendant in *Faretta* wanted to manage his own defense; he did not want counsel to act on his behalf. The issue before the court was the extent to which a defendant has the right to present his own defense. The Court concluded that "the defendant . . . must be free personally to decide whether in his particular case counsel is to his advantage." 422 U.S. at 834, 95 S.Ct. 2525. That decision must be honored by the court, even if the choice is detrimental, "out of 'that respect for the individual which is the lifeblood of the law.'" *Id.* (*quoting Illinois v. Allen*, 397 U.S. 337, 350-351, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), *reh'g denied*, 398 U.S. 915, 90 S.Ct. 1684, 26 L.Ed.2d 80).

The Court recognized that managing one's own defense results in the relinquishment of "the traditional benefits associated with the right to counsel." 422 U.S. at 835, 95 S.Ct. 2525. It is the relinquishing of these benefits that triggers the requirement of a knowing, voluntary, and intelligent waiver. *Id.* at 835, 95 S.Ct. 2525.

In *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), reh'g denied, 465 U.S. 1112, 104 S.Ct. 1620, 80 L.Ed.2d 148, the Supreme Court addressed the scope of the right to conduct one's own defense, holding that this right was not violated by the unsolicited participation of standby counsel. Again, the focus of the Court was on determining to what extent a court could circumscribe a defendant's right to present his own defense. The Court found that the appointment and limited participation of standby counsel was not inconsistent with the "dignity and autonomy of the accused." *Id.* at 177, 104 S.Ct. 944. The Court noted that a

"defendant does not have a constitutional right to choreograph special appearances by counsel." *Id.* at 183, 104 S.Ct. 944. The interest of the court in appointing standby counsel is to assist the defendant to comply with court rules and protocol and enable him to achieve "his own clearly indicated goals." *Id.* at 184, 104 S.Ct. 944.

While *McKaskle* provides guidance to courts as to where the line is crossed between the assistance or enabling of standby counsel to an already pro se defendant and impermissible intrusion, it does not provide any guidance to courts for the reverse situation, i.e., when does a defendant who is represented by counsel cross the line from being represented to proceeding pro se? We cannot say that either *Faretta* or *McKaskle*, both affirmations of the liberty and autonomy rights of a defendant, define a line of self-expression that defendants cannot cross without the court's securing of a knowing, voluntary and intelligent waiver.

Banks agreed to the continued representation by his counsel throughout trial, and while he performed some tasks contrary to counsel's advice, he never did so unattended or unadvised by counsel. In fact, it is clear from the record that he received counsel's advice on an ongoing basis. A disagreement between counsel and a defendant is not enough in itself to render a defendant pro se. *Hakeem v. Beyer*, 990 F.2d 750, 765 (3d Cir. 1993). Accordingly, the cases requiring a waiver colloquy when the defendant indicates a desire to proceed pro se do not in themselves dictate such a procedure here.

Moreover, to the extent that Banks has urged that the right to testify on one's behalf -- which was perhaps the most troubling of Banks's strategic decisions -- should be somehow constricted if necessary to ensure Sixth Amendment

rights, this seems to run directly counter to *Faretta*, and its focus on an individual's right to control his defense. *Faretta*, 422 U.S. at 834, 95 S.Ct. 2525. Further, we know of no 15 case that interposes a requirement of a colloquy in connection with the right to testify on one's own behalf.[8]

The Pennsylvania Supreme Court's analysis focused solely on Banks's decision as an exercise of his right to testify on his own behalf. It did not view Banks's choices as implicating his Sixth Amendment rights.[9] Banks says that this analysis is contrary to a line of cases that stand for the proposition that such a colloquy is required when there is "hybrid representation," that is, where an attorney and a defendant each address the court or in other ways share defense functions.[10]

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[8] In *Boardman v. Estelle*, the Ninth Circuit analogized a right to allocution to the right to testify in one's own behalf and characterized them as "entirely separate. . . . A defendant who elects representation by counsel does not simultaneously waive his right to testify at trial." 957 F.2d 1523, 1528 (9th Cir.), *cert. denied*, 506 U.S. 904, 113 S.Ct. 297, 121 L.Ed.2d 221 (1992). Likewise, the exercise of one's personal right to testify is not tantamount to proceeding pro se.

[9] The dissent in *Banks II*, however, both viewed the issue as raising Sixth Amendment concerns and viewed the trial court as violating Banks's Sixth Amendment rights. See discussion, *infra* at 25-26.

[10] Interestingly, Banks's approach to this issue seems to have come full circle and, at oral argument, his counsel argued the issue precisely as the Pennsylvania Supreme Court had characterized it, namely, as a duty to prevent Banks from testifying. And, in his brief, Banks quotes the extensive colloquy between Banks and the

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In the typical hybrid representation, a trial court acts in its discretion to appoint standby counsel for a pro se defendant who later challenges the attorney's role as overly intrusive under *Faretta*'s right to self- representation. *See, e.g., McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), *reh'g denied*, 465 U.S. 1112, 104 S.Ct. 1620, 80 L.Ed.2d 148. Some federal courts have opined that a colloquy should be conducted when the defendant assumes "core functions" of the defense.

> When the accused assumes functions that are at the core of the lawyer's traditional role . . . he will often undermine his own defense. Because he has a constitutional right to have his lawyer perform core functions, he must knowingly and intelligently waive that right.

United States v. Kimmel, 672 F.2d 720, 721 (9th Cir. 1982). *But see United States v. Leggett*, 81 F.3d 220 (D.C.Cir. 1996) (cross-examination of some witnesses, asking of questions of defense counsel, proposing questions for other witnesses and delivering closing argument did not require the trial court to give waiver warnings); *see also Bontempo v. Fenton*, 692 F.2d 954, 960 (3d Cir. 1982), *cert. denied*, 460 U.S. 1055, 103 S.Ct. 1506, 75 L.Ed.2d 935 (1983) (supplemental closing statement); *Robinson v. United States*, 897 F.2d 903, 906-07 (7th Cir. 1990) (same).

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trial court before, and during, his testimony, and urges that the court should have mentioned the right to counsel and warned of inherent danger in waiving counsel. We find no support for the proposition under *Faretta* or *McKaskle*, nor has any Supreme Court case been referenced as authority for this proposition.

As we have noted, under the standards of *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), we may challenge the state court analysis only if it is contrary to or unreasonably applies clearly established federal law. It is unclear whether it must be stated in Supreme Court precedent, or whether it may be derived from principles enunciated in Supreme Court precedent. *Id.* at 408-09 ("Today's case does not require us to decide how such 'extension of legal principle' cases should be treated under § 2254(d)(1)."). Regardless, we conclude that the federal decisions do not apply so directly to the facts at hand so as to constitute an extension of principles enunciated in Supreme Court precedent. The lack of clearly applicable principles in such precedent is fatal to Banks's argument. While the decisions Banks cites might inform our decision were we reviewing a district court trial, we are not here engaged in "the broad exercise of supervisory power" that we would possess over a district trial court decision. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) (quoting from the appellate court opinion, 473 F.2d 1236, 1238 (1st Cir. 1973)). *See, e.g., United States v. Davis*, 269 F.3d 514 (5th Cir. 2001) (reversing the district court's handling of hybrid representation situation).

The Supreme Court has never addressed a situation such as this, let alone indicated that the situation would implicate a Sixth Amendment right in the same way as defendant's right to proceed without counsel, or the prerequisites to a defendant's proceeding pro se. Banks did not reject the assistance of counsel; he acted with counsel's assistance, but chose to reject the advice of counsel. Although we have found some federal decisions that have adapted the case law to "hybrid" factual settings, we find none of these rulings to be persuasive extensions of U.S. Supreme Court precedent so

as to constitute clearly established law regarding Sixth Amendment violations in such a fact pattern.[11] Further, many

[11] We note that Banks cites several Pennsylvania cases that he contends bear on the issue before us: *Commonwealth v. Bell*, 442 Pa. 566, 276 A.2d 834 (1971); *Commonwealth v. McGrogan*, 449 Pa. 584, 297 A.2d 456 (1972); *Commonwealth v. Palmer*, 315 Pa.Super. 601, 462 A.2d 755 (1983). In one, the Pennsylvania Supreme Court stated that the introduction of evidence is a function that is allocated solely to counsel. *Commonwealth v. Bell*, 442 Pa. 566, 276 A.2d 834 (1971). In *Banks I*, Chief Justice Nix dissented, and was joined in his dissent by Justice Zappala, because he concluded that, in accordance with *Bell*, Banks had assumed a function allocated to counsel and "was acting as his own attorney and was representing himself." 521 A.2d at 23. While Chief Justice Nix's interpretation of Pennsylvania case law would require a waiver colloquy so as to afford federal constitutional protections, his was not the majority opinion. None of the Pennsylvania cases referred to us by Banks appears to be directly on point. Further, it is not our province to determine whether the Pennsylvania Supreme Court's decision was contrary to, or an unreasonable application of, its *own* precedent, but, rather, of clearly established federal precedent.

The three federal cases that Banks cites in addition to *McKaskle* and *Faretta* as defining an "exclusive province of counsel" at trial are inapposite. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) is concerned exclusively with whether *appellate* counsel is obligated to raise all nonfrivolous claims proffered by the appellant. *See id.* at n. 7. In *Vess v. Peyton*, 352 F.2d 325 (4th Cir. 1965), *cert. denied*, 383 U.S. 953, 86 S.Ct. 1215, 16 L.Ed.2d 214 (1966), the Fourth Circuit affirmed the district court's determination that there was no error in appellant's not having been provided counsel at a preliminary hearing (a determination that is no longer good law) and that the record supported the conclusion that appellant's guilty plea was knowingly and voluntarily offered. The court also rejected appellant's

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of the decisions are unpublished and have no precedential value.[12] Accordingly, we agree with the District Court that Banks is not entitled to habeas relief on this ground.

(2) Application of Mills v. Maryland in the Penalty Phase

Banks contends that the Pennsylvania Supreme Court determination regarding the jury instructions and verdict slip during the penalty phase involved an unreasonable application of *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). The District Court did not disturb the Pennsylvania Supreme Court's ruling regarding the penalty phase, reasoning that *Mills v. Maryland* was not retroactive, and also stating in summary fashion that "Supreme Court precedent (in the form of *Mills* and *McKoy*) did not require an outcome contrary to that reached by the state courts." *Banks VIII* at 544. We disagree with both conclusions.

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contention that the failure to call certain witnesses suggested by the defendant did not constitute inadequate representation of counsel. Likewise, *Buckelew v. United States*, 575 F.2d 515 (5th Cir. 1978) rejected a claim that an uncalled out-of-state witness constituted ineffective assistance of counsel. None of these cases could be read to mandate that a trial judge treat defendant's insistence upon testifying, and his introduction of evidence as part of that testimony -- or even the directing and conducting of the cross-examination -- as an assertion of a right to proceed pro se.

[12] *See, e.g., Robinson v. United States*, 897 F.2d 903 (7th Cir. 1990); *United States v. Parker*, 176 F.3d 486 (9th Cir. 1999) (unpublished); *Islam v. Miller*, 166 F.3d 1200 (2d Cir. 1998) (unpublished); *United States v. Demeke*, 152 F.3d 921 (2d Cir. 1998) (unpublished).

(a) Does Mills Apply?

We first note that the District Court apparently misperceived the way in which the AEDPA standard applies to the relevant state court proceeding. The Court stated that the *Mills* decision was rendered in 1988, five years after Banks's conviction and sentence.

However, the point in time at which the Supreme Court jurisprudence must have been "clearly established" is at the time that the state court makes the ruling on the federal constitutional issue that is being scrutinized. The Pennsylvania Supreme Court issued its opinion in *Banks II*, construing *Mills* in 1995, eight years after *Mills* became law. If the Pennsylvania Supreme Court had questioned whether *Mills* was applicable to the trial court's conduct, we would have needed to inquire whether Mills codified law that was clearly established at the time of the trial. But that is not the question before us. AEDPA defines the parameters of federal court review of state determinations of federal law. In the Pennsylvania Supreme Court opinion, it applied *Mills*. We are being asked to determine whether that application of *Mills* was contrary to, or an unreasonable application of, clearly established federal law. To make that determination, it is only the state court's decision that cited to *Mills* and the law as it was clearly established then, in 1995, not the law at the time of Banks's sentencing, that matters.

(b) Are We Compelled to Conduct a Retroactivity Analysis under Teague?

The Commonwealth also argues that we should not apply the lessons of *Mills* to Banks's case, because Banks's conviction became final before *Mills* was decided, and because the Pennsylvania Supreme Court has consistently decided that *Mills* is not retroactive. Under *Teague v. Lane*, 489 U.S. 288, 300, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), *reh'g denied*, 490 U.S. 1031, 109 S.Ct. 1771, 104 L.Ed.2d 206 (1989), retroactivity is a "threshold question," because it is in that determination that a court establishes whether a rule enunciated on the basis of a set of facts will apply only prospectively or will be applied retroactively to all who are similarly situated. *See id.* at 299-301, 109 S.Ct. 1060.[13] Retroactivity analyses can be complex, but here the analysis is not, because we do not need to focus on anything other than the reasoning and determination of the Pennsylvania Supreme Court. We acknowledge that the Pennsylvania Supreme Court has stated that it will not give retroactive effect to "new rules" handed down after a conviction has become final.[14] We acknowledge further that the

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[13] Because we find *Teague* not to govern our analysis, our discussion of its principles are limited to explaining why it is not controlling here, despite the arguments of the parties. We note, however, that recent decisions have called into question to what extent *Teague* has continued force independent of AEDPA. *See, e.g., Tyler v. Cain*, 533 U.S. 656, ____-____, 121 S.Ct. 2478, 2483-84, 150 L.Ed.2d 632 (June 28, 2001) (rejecting application of the *Teague* exceptions to construe *Cage*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) as retroactive under 28 U.S.C. § 2244(b)(2)(A)).

[14] "[A] new rule of law will not be applied retroactively 'to

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Pennsylvania Supreme Court has specifically noted its skepticism regarding the retroactive application of *Mills* to cases other than non-final sentences, *see, e.g., Commonwealth v. Cross*, 555 Pa. 603, 726 A.2d 333, 338 n. 4, (1999), and that it disagrees with our ruling in *Frey*.[15] *See Cross*, 726 A.2d at 337.

However, the ruling in *Banks II* is what determines the scope of our review, and in *Banks II*, the Pennsylvania Supreme Court held that, following its previous rulings in this area, the sentencing process did not violate *Mills*. To determine whether the Pennsylvania Supreme Court's ruling in *Banks* was contrary to, or involved an unreasonable application of, Supreme Court precedent, we do not need to undertake any retroactivity analysis, because, notably, the

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any case on collateral review unless that decision was handed down during the pendency of appellant's direct appeal and the issue was properly preserved there or . . . was nonwaivable.'" *Commonwealth v. Cross*, 555 Pa. 603, 726 A.2d 333, 338 (1999) (*quoting Commonwealth v. Gillespie*, 512 Pa. 349, 516 A.2d 1180, 1183 (1986)).

[15] The Pennsylvania Supreme Court has asserted that it has "concurrent jurisdiction" with this court "as to federal constitutional questions" and as such may "formulate its own interpretation of Supreme Court precedent, which may be in opposition to that stated by the lower federal courts." *Cross*, 726 A.2d at 338 n. 4. At the same time, the United States Supreme Court has made it clear that a federal court must apply independent judgment in its interpretation of federal law and if, "after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody . . . violates the Constitution, that independent judgment should prevail." *Williams*, 529 U.S. at 389, 120 S.Ct. 1495.

Pennsylvania Supreme Court undertook none. It examined the penalty phase on the merits based on *Mills*, making no reference to any concerns regarding *Mills'* applicability to the case. *Banks II*, 656 A.2d 470.

The government argues that if we are considering the applicability of a new rule (assuming *Mills* is a new rule -- which is not at all clear[16]), we must be guided by *Teague v.*

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[16] To the extent that *Teague* still provides the appropriate scheme for analysis, *see supra* n. 13, we note that the Sixth Circuit has explicitly found that *Mills* does not comprise a "new rule" under *Teague*. *Gall v. Parker*, 231 F.3d 265, 322 (6th Cir. 2000), *reh'g and reh'g en banc denied; cert. denied*, ____ U.S. ____, 121 S.Ct. 2577, 150 L.Ed.2d 739 (2001). *Accord, DeShields v. Snyder*, 829 F.Supp. 676, 688 (D.Del. 1993). Other courts have determined that it is immaterial whether *Mills* is a new rule, because, whether or not the rule is new, it falls within the second exception of *Teague*. *See, e.g., Williams v. Dixon*, 961 F.2d 448 (4th Cir.), *cert. denied*, 506 U.S. 991, 113 S.Ct. 510, 121 L.Ed.2d 445 (1992). The Fifth and the Eighth Circuit, in contrast, have classified *Mills* as a new rule. *See, e.g., Miller v. Lockhart*, 65 F.3d 676, 686 (8th Cir. 1995); *Cordova v. Collins*, 953 F.2d 167, 173 (5th Cir.), *cert. denied*, 502 U.S. 1067, 112 S.Ct. 959, 117 L.Ed.2d 125 (1992). Both of these cases are distinguishable, however. In *Cordova* the Fifth Circuit summarily concluded that *Teague* precluded it from applying a decision announced after Cordova's conviction was final. The court supplied no analysis nor explanation to support its conclusion. 953 F.2d at 173. In *Miller*, only one of the four significant pre-*Mills* cases had been decided by the U.S. Supreme Court prior to Miller's conviction, and that decision, *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), was a plurality opinion whose fractured opinions were considered in *Miller* not to" 'compel' the further holding that a unanimity requirement for mitigating circumstances is unconstitutional." 65 F.3d at 686. The other three decisions -- that were

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Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and *O'Dell v. Netherland*, 521 U.S. 151, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997), and refuse to apply such new rule unless one of the two narrow exceptions referenced in the case law applies.[17] However, we conclude that we need not explore

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decided prior to Banks's conviction becoming final -- were *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (applying *Lockett* in a 5-4 decision with two concurrences); *Skipper v. South Carolina*, 476 U.S. 1, 4, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (characterizing the rules that a sentencer may not be precluded from considering any "aspect of a defendant's character or record and any of the circumstances of the offense" and "that a sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence" as well established; there were six justices in the majority and three concurring); *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) (unanimously holding that mitigating evidence was wrongly excluded from consideration).

[17] The two exceptions are:

(1) "rules 'forbidding criminal punishment of certain primary conduct [and] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense'" *O'Dell v. Netherland*, 521 U.S. 151, 157, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997) (*quoting Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989));

(2) "'watershed rules' of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *O'Dell* at 157 (quoting *Graham v. Collins*, 506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993), *reh'g denied*, 507 U.S. 968, 113 S.Ct. 1406, 122 L.Ed.2d 778.).

(Continued)

the contours of *Mills* (and its predecessors) as to whether it is "new;" nor do we need to consider, as the parties have done, the applicability of the exceptions. This is because, as the brief of amici curiae notes,[18] resort to *Teague* is misplaced. *Teague* teaches that the federal courts in habeas corpus proceedings should be reluctant to apply new rules of federal jurisprudence in state court cases decided before such new rules were handed down. Principles of comity and finality counsel that we maintain a circumscribed scope of habeas review. *Teague*, 489 U.S. at 308, 109 S.Ct. 1060. Here, however, as we have noted, the Pennsylvania Supreme Court applied *Mills*. We are examining the application of *Mills*, not because we wish to impose a new rule not considered by the Pennsylvania Supreme Court, but as the court in fact *did* consider and apply it.[19] In such a situation, *Teague* is not implicated. Accordingly, we need ask only whether the

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(Continued)

As noted in *supra* n. 16, the Fourth Circuit has found *Mills* to fall within the second *Teague* exception.

[18] Brief of Amici Curiae, The Pennsylvania Association of Criminal Defense Lawyers and Louis Natali, Esq., Supporting Appellants. We are grateful to amici for their careful reasoning and research. Their brief was thorough and expertly written; more, it was genuinely helpful.

[19] As we reference below, the precise holding of the Pennsylvania Supreme Court was that "[n]either the jury instructions, the jury poll nor the verdict slips in the instant matter contained language which would violate the dictates of *Mills*." *Banks II*, 656 A.2d at 470.

Pennsylvania Supreme Court's application of *Mills* should be disturbed under the AEDPA standards.[20]

(c) The Pennsylvania Supreme Court's Application of Mills

We disagree with the District Court's refusal to address how the Pennsylvania Supreme Court applied *Mills* in *Banks II*. We do, however, agree with the District Court that, in any event, our analysis would not be dictated by *Frey* -- which was pre-AEDPA -- but by the AEDPA standard. Thus, we must ask whether the Pennsylvania Supreme Court determination regarding the constitutionality of the instructions, verdict slip, and polling of the jury involved an unreasonable application of *Mills*.

The Pennsylvania Supreme Court relied on its own precedents to conclude that the sentencing proceedings in Banks did not violate *Mills*, dismissing each of Banks's contentions in turn. "This [jury] instruction, which mirrors the language found in the death penalty statute of our Sentencing Code, has previously been reviewed by this Court and determined not to violate *Mills*." *Banks II*, 656 A.2d at 470. "The form of verdict slip employed in the instant matter was virtually identical to that considered by this Court in

[20] The District Court never really addressed this issue because it concluded that neither *Mills* nor *Frey* should apply. However, since the parties have extensively briefed the issue before us, we will address it and decide it, rather than remanding to the District Court. *Hein v. FDIC*, 88 F.3d 210, 221(3d Cir.1996), *cert. denied sub nom. Hein v. McNeil*, 519 U.S. 1056, 117 S.Ct. 683, 136 L.Ed.2d 608 (1997) ("To the extent that we can decide these issues as a matter of law without further factual development, we serve the interests of judicial economy as well as the interests of the parties in avoiding unnecessary re-litigation.")

Commonwealth v. Frey and determined not to infer to the jury a requirement of unanimity with respect to mitigating circumstances." *Id.* (Citation omitted). "Nor do the answers provided by the individual jurors during the poll suggest in any manner that they believed unanimity was required in finding mitigating circumstances." *Id.* The court then concluded, "In sum, neither the instructions of the court nor the printed instructions on the verdict slips nor the questions and responses of the court and jury during polling, standing alone or viewed in total, infer a requirement of unanimity which would violate the dictates of *Mills*." *Id.* at 471.

Consistently, the Pennsylvania Supreme Court relied on its own prior determinations in upholding Banks's sentencing proceedings. Our task is to review state court proceedings not to ensure the consistency of the Pennsylvania Supreme Court's application of its law, but, rather, to assure proper application of United States Supreme Court teachings. In *Williams v. Taylor*, the Supreme Court approvingly quoted the Seventh Circuit:

> Section 2254(d) requires us to give state courts' opinions a respectful reading, and to listen carefully to their conclusions, but when the state court addresses a legal question, it is the law 'as determined by the Supreme Court of the United States' that prevails.

24 529 U.S. at 387, 120 S.Ct. 1495 (*quoting Lindh v. Murphy*, 96 F.3d 856, 869 (7th Cir. 1996)).

The United States Supreme Court has provided ample guidance in this area. There are two overarching themes in *Mills* that are further clarified in *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), *reh'g denied* 495 U.S. 924, 110 S.Ct. 1961, 109 L.Ed.2d 322.

First, if under the sentencing scheme it is possible for jurors to agree that mitigating circumstances exist, but, because of a lack of unanimity as to which mitigating circumstances exist, to conclude that they may not consider those circumstances, the sentencing scheme is unconstitutional. *Mills*, 486 U.S. at 374, 108 S.Ct. 1860. Second, and related to the first, the critical question is not whether a constitutional construction is possible, but whether a reasonable jury could have interpreted the instructions in an unconstitutional manner, that is, as restricting them to finding only those mitigating circumstances as to which all can agree. *Id.* at 375-76, 108 S.Ct. 1860. We conclude that the Pennsylvania Supreme Court failed to analyze the penalty phase of Banks's trial in accordance with these principles, and, as a consequence, unreasonably applied *Mills*. As Judge Padova recently pointed out in granting habeas relief in a very similar case, *Hackett v. Price*, 2001 WL 884721 (E.D.Pa. Aug. 6, 2001), the state court

> misconstrue[d] the court's task in examining for *Mills* error by focusing on the meaning of the statute rather than on the issue of jury confusion. As *Mills* instructs, it is the danger of jury misinterpretation of the statutory scheme, rather than the existence of a constitutional interpretation of the statute by the courts, that creates the *Mills* problem.

Id. at *19.

We must conclude that the Pennsylvania Supreme Court ruling involved an unreasonable application of *Mills*.[21]

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[21] Banks argues that, in fact, the determination was "contrary to" *Mills*, because it violated *Mills*' dictates. We think the better

(Continued)

In fact, we conclude that the Pennsylvania Supreme Court ruled that there was no *Mills* violation without ever really applying the teachings of *Mills*, and by examining the statute, not the potential for confusion by jurors in what they were told to do. Further, as noted in *Hackett*, *Mills* itself involved a situation in which the statute had been interpreted to be constitutional, but the Supreme Court vacated the sentence based on the risk of confusion. *Id.* at 19.

We will examine each aspect of the Pennsylvania Supreme Court's analysis of the jury's involvement in the penalty phase -- the instructions themselves, the verdict slip, and the polling of the jury following the sentencing verdict.

i. Jury Instructions

In *Banks II*, the Pennsylvania Supreme Court quoted three lines of the jury instructions:

> The sentence you impose will depend upon your findings concerning aggravating and mitigating circumstances. The Crime[s] Code in this Commonwealth provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances. The verdict must be a sentence of life imprisonment in all other cases.

(Continued)

analysis, since the Pennsylvania Supreme Court referenced *Mills* and seemed to be considering how it impacted the Banks case, is to rely on the "unreasonable application," which, in any event, is clearly evident.

656 A.2d at 470.

The court then opined that because the instruction "mirrors the language found in the death penalty statute of our Sentencing Code [that] has previously been reviewed by this court and determined not to violate Mills" Banks's claim was "without merit." *Id.*[22] (*citing Commonwealth v. Hackett*, 534 Pa. 210, 627 A.2d 719 (1993); *Commonwealth v. Marshall*, 534 Pa. 488, 633 A.2d 1100 (1993), *rearg. denied* (1994); *Commonwealth v. O'Shea*, 523 Pa. 384, 567 A.2d 1023 (1989), *cert. denied*, 498 U.S. 881, 111 S.Ct. 225, 112 L.Ed.2d 180 (1990)).

In *Hackett*, the Pennsylvania Supreme Court had attempted to distinguish *Mills* based on the Maryland statute, reasoning that since the Maryland statute barred consideration of mitigating evidence unless there was unanimous agreement and the Pennsylvania statute required unanimity as to the absence of a mitigating circumstance, the Pennsylvania statute allowed individual jurors to prevent death sentences but not to compel them. *See Hackett*, 2001 WL 884721 at *19. The differences in the statutes were not enough to render the Pennsylvania statute constitutional, since the danger of jury misinterpretation was present in both statutes, and the Pennsylvania Supreme Court had examined only the statute, not the possibility that the jury had been confused by the instructions given. *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), *reh'g denied* 495 U.S.

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22 *Hackett*, as noted above, was recently vacated by the Eastern District of Pennsylvania. *See* 2001 WL 884721. Post-conviction relief was denied in *O'Shea* in 1999 at 556 Pa. 6, 726 A.2d 376, *cert. denied*, 528 U.S. 1119, 120 S.Ct. 941, 145 L.Ed.2d 818 (2000).

924, 110 S.Ct. 1961, 109 L.Ed.2d 322, established that the jury instructions must be considered in the context of the entire proceeding, and the Pennsylvania Supreme Court's failure to do so was contrary to clearly established federal law. *Id.* at 21. Here, the Pennsylvania Supreme Court has essentially ignored the teachings of *Boyde* and engaged the same reasoning regarding the constitutionality of the instructions as in *Hackett* -- itself constitutionally defective.

Proper application of *Mills* requires at the outset that the reviewing court examine the entire jury instructions, posing the "critical question" whether a reasonable jury could have concluded from the instruction that unanimity was required to find a mitigating circumstance. *Mills*, 486 U.S. at 370, 108 S.Ct. 1860. Also, the Boyde standard requires that the court view the instruction in its totality, not examine in isolation a few sentences that reference the Crimes Code. *Boyde*, 494 U.S. at 378, 110 S.Ct. 1190.

In *Boyde*, the Supreme Court iterated the standard of evaluating jury instructions as "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence," *Id.* at 380, 110 S.Ct. 1190, and it reiterates the *Mills* principle that jury instructions must be carefully considered in their entirety. *Mills*, 486 U.S. at 384, 108 S.Ct. 1860. "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Boyde*, 494 U.S. at 378, 110 S.Ct. 1190. In *Banks II*, the Pennsylvania Supreme Court never examined the jury instruction from that vantage point. Rather, it looked at one part of the instruction and found that it was acceptable because it tracked the permissible statutory provisions and did not "infer" a requirement of unanimity. 656 A.2d at 470. Its conclusion was based not on how a

juror might interpret its content, but on its own previous statutory construction of the language at issue. Here, even more starkly than in *Hackett*, the Pennsylvania Supreme Court merely stated that the statutory language had been reviewed and "determined not to violate Mills." *Banks II*, 656 A.2d at 470. There was no further analysis.

We will juxtapose the instructions given by the trial court with those we found in *Frey* to be constitutionally defective.

Frey Instructions

Members of the jury, you must now decide whether this defendant should be sentenced to death or life imprisonment. The sentence will depend on your finding concerning aggravating and mitigating circumstances. The Crimes Code provides that the verdict must be a sentence of death if the jury unanimously finds one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life in all other cases.

Banks Instructions

Members of the jury, you must now decide whether the defendant in this case is to be sentenced to death or to life imprisonment on each of the Informations upon which you have returned a verdict of guilty of murder in the first degree.

The sentence you will impose will depend on your findings concerning aggravating and mitigating circumstances. The Crimes Code in this Commonwealth provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstances, or if the jury unanimously finds

Frey v. Fulcomer, 132 F.3d 916, 922 (3d Cir. 1997), *cert. denied*, 524 U.S. 911, 118 S.Ct. 2076, 141 L.Ed.2d 151 (1998).

Remember that your verdict must be a sentence of death if you unanimously find at least one aggravating circumstances (sic) and no mitigating circumstances, or if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. In all other cases, your verdict must be a sentence of life imprisonment. *Id.*

Now, the Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt . . . The defendant has the burden of proving mitigating circumstances but only by a preponderance of the evidence. *Id.* at 923.

one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances.

Remember, under the law of this Commonwealth, your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstance, or if you unanimously find one or more aggravating circumstances which then outweigh any mitigating circumstances.

In all other cases, your verdict would be life imprisonment.

Once again, the Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt. The defendant has the burden of proving mitigating circumstances by a preponderance of the evidence.

If, after conscientious and thorough deliberations, you are unable to agree on your findings and your verdict, you should report that to me.

While, as we have noted, *Frey* does not control our holding here, nonetheless our reasoning there regarding the *Mills* implications of a very similar jury charge is instructive and applicable.[23] As we said in *Frey*:

> Specifically, we must determine whether it is reasonably likely that the jury could have understood the charge to require unanimity in consideration of mitigating evidence. We need not determine whether the jurors *did*, in fact, understand the charge to require unanimity in consideration of mitigating evidence-only whether it was reasonably likely. *See Boyde*, 494 U.S. at 380, 110 S.Ct. at 1197-98; *Mills*, 486 U.S. at 384, 108 S.Ct. at 1870.
>
> Examining the language of the jury charge, we must answer in the affirmative. First and foremost, read in its entirety, the relevant portion of the jury charge emphasizes the importance of a unanimous finding, using the phrase frequently and in close proximity to -- within seven words of -- the mitigating circumstances clause. We describe the relevant portion of the sentence: "if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance. . . ." Considering this close proximity -- the clause is, to the ear and to the mind, one sound bite -- it is quite possible that a juror would, regardless of other qualifying language, believe that

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[23] In his brief Banks sets out the jury instruction in *Frey* alongside those given here, and notes that the instruction given here was even more egregious than in *Frey* in terms of its import regarding the need for the jurors to "agree" on their" findings." We agree.

> mitigating circumstances had to be found unanimously.
>
> * * *
>
> Thus, the unanimity language in the Frey charge could only modify the term "find," and hence the jury could reasonably have believed that unanimity was required in *both* its ultimate and interim conclusions, especially given the close proximity we have described.
>
> * * *
>
> Other parts of the Frey charge were more likely to increase the confusion rather than lessen it. As in *Zettlemoyer*, the Frey trial court made a point of instructing the jury on the relevant burdens of proof relating to both aggravating and mitigating circumstances.
>
> * * *
>
> [But] Unlike *Zettlemoyer*, where the court specifically instructed the jury that aggravating circumstances must be proven "unanimously, beyond a reasonable doubt," the trial court here did not stress that the different burdens that attach to aggravating and mitigating circumstances also entail different unanimity requirements. A lay jury might plausibly conclude, therefore, that aggravating *and* mitigating circumstances must be discussed and unanimously agreed to, as is typically the case when considering whether a burden of proof has been met. Such an understanding, however, is plainly inconsistent with the requirements of *Mills*, and adds to our concern that the jury could have understood the charge to require unanimity in consideration of mitigating evidence.

132 F.3d at 923-24.

These same concerns dictate the same result here. The instruction here, like the one we examined in *Frey*, runs afoul of *Mills*, and the Pennsylvania Supreme Court's assessment of the instruction involved an unreasonable application of *Mills*. The instructions are in themselves ambiguous, allowing for a jury to infer that the requirement of unanimity applies both to aggravating and mitigating circumstances. There is no way that a juror would understand that a mitigating circumstance could be considered by less than all jurors. Further, when the judge clarified the difference between aggravating and mitigating circumstances, he described the requirements for finding aggravating circumstances and then said:

> The defendant has the burden of proving mitigating circumstances by a preponderance of the evidence. The preponderance of the evidence is a lesser burden of proof than beyond a reasonable doubt. A preponderance of the evidence exists where one side is more believable than the other or, as has been explained to you, a preponderance exists whenever the scales tip ever so slightly.

A reasonable juror could readily infer from the fact that the distinctions between the burden of proof were explained, but no mention was made of a distinction between a requirement of unanimity for a finding of aggravating circumstances and the requirement for mitigating circumstances, that the same requirement of unanimity applied. The Banks court went on to stress:

> Remember, again, your verdict in each case must be unanimous. It cannot be reached by a majority vote or by any percentage. It must be the verdict of each and every one of you.

Considered as a whole, the jury instructions leave no doubt that "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380, 110 S.Ct. 1190.

ii. Verdict Slip

In its review of the verdict slip, the Pennsylvania Supreme Court noted that the form of slip used was "virtually identical to" the one the court had considered in *Commonwealth v. Frey* and had "determined not to infer to the jury a requirement of unanimity with respect to mitigating circumstances." *Banks II*, 656 A.2d at 470. It therefore rejected as "unfounded" Banks's claim that the verdict slip "impermissibly suggested to the jury that it must find mitigating circumstances by unanimous vote." *Id.*

The Pennsylvania Supreme Court then reviewed the poll by the foreman but determined that, because both the oral instructions and the instructions on the verdict slip were proper, the situation was distinguishable from *Commonwealth v. Young*, 524 Pa. 373, 572 A.2d 1217 (1990), *resentencing after remand aff'd*, 36 Conn.App. 516, 651 A.2d 1313 (1993), *cert. denied*, 511 U.S. 1012, 114 S.Ct. 1389, 128 L.Ed.2d 63 (1994), in which the court had remanded for resentencing a case in which the oral instructions were inconsistent with the verdict sheet. *See Banks II*, 656 A.2d at 471. In *Young*, the jury charge required a sentence of death if "the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances." *Young*, 572 A.2d at 1228. The verdict sheet, however, indicated that "We, the jury,

unanimously find that the defendant has proven the following mitigating circumstances by a preponderance of the evidence." *Id.* (Emphasis in original). The Pennsylvania Supreme Court found that "[t]his inconsistency requires a remand of this case for resentencing. . . ." *Id.* In contrast, in *Banks II*, the Pennsylvania Supreme Court found nothing in the verdict slip questions, or the jurors' responses, that would "indicate they believed they had to find mitigating circumstances unanimously." 656 A.2d at 471.

But, again, the court undertook a different inquiry from that required under *Mills*. *Mills* requires a court to assess whether a need for a unanimous finding of mitigating circumstances is one that "a reasonable jury could have drawn from . . . the verdict form employed." *Mills*, 486 U.S. at 375-76, 108 S.Ct. 1860.

Here, we cannot help but find that a reasonable juror could so conclude. In fact, we believe the form itself *does* suggest the need for unanimity. The verdict form is a three-page document, containing two "numbered" statements:

> 1. We the jury unanimously sentence the defendant in the above matter to
>
> X Death
> ___ Life Imprisonment
>
> 2. (To be completed if the Sentence is Death) ***We the jury have found unanimously*** (emphasis added)
>
> ___ At least one aggravating circumstance and no mitigating circumstances. The aggravated circumstance(s) (is)(are):

> 1. ___ In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.
>
> 2. ___ The defendant has a significant history of felony convictions involving the use or threat of violence to the person.
>
> 3. ___ The defendant has been convicted of another federal or state offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.
>
> *Or*
>
> X One or more aggravating circumstances which outweigh any mitigating circumstance or circumstances.
>
> The aggravating circumstance(s) (is)(are):
>
> > 1. ___ In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.
> >
> > 2. ___ The defendant has a significant history of felony convictions involving the use of threat of violence to the person.

3. X The defendant has been convicted of another federal or state offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

The mitigating circumstance(s) (is)(are):

1. X The defendant was under the influence of extreme mental or emotional disturbance.

2. ___ The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

3. ___ Any other mitigating matter concerning the character or record of the defendant or the circumstances of his offense.

Each form was marked as shown above and signed by the foreperson of the jury.

We find it only reasonable to conclude that the form itself is at least confusing, and more likely suggestive, regarding the need for unanimity as to mitigating circumstances. The lead-in language to the overarching second question is "We the jury have found unanimously. . . ." By implication, everything that follows was found unanimously. What follows is a reference both to aggravating and to mitigating circumstances, with no additional language that would imply that there is a different standard for aggravating

circumstances than there is for mitigating circumstances. There is also no language anywhere on the form from which the jury could infer that a mitigating circumstance might be marked if only one juror had found that circumstance to exist.

Thus, the structure and form of the verdict slip itself runs afoul of the dictates of Mills. Further, for the Pennsylvania Supreme Court to have ruled that there was no Mills violation without an examination of the content and implications of the verdict slip and without employing the proper inquiry was an unreasonable application of Mills.

iii. Jury Poll

Of the three elements -- the instructions, the verdict slip, and the jury poll -- the Pennsylvania Supreme Court opinion devoted the greatest attention to the polling of the jury, actually quoting the trial court's words. The polling questions and answers never used the term "unanimous" regarding the verdict or the finding of any of the aggravating or mitigating circumstances. While the jurors were asked whether they each found the "same" circumstances as the ones referred to before, it is difficult to say whether the questions were confusing in this regard. We do agree with the Pennsylvania Supreme Court in its view that the polling of a jury can compound the problem created by a questionable charge or verdict slip, as was the case in *Young*. *Banks II*, 656 A.2d at 471. Here, the polling does not appear either to add to or reduce the confusion as to the *Mills* problems we have already identified in the penalty phase instructions and verdict slip.

C. CONCLUSION

Because the Pennsylvania Supreme Court ruling regarding the application of *Mills* to the penalty phase instruction and verdict slip in Banks's trial was unreasonable, habeas relief will be granted and we will REVERSE the Order of the District Court and instruct it to GRANT a provisional writ of habeas corpus directed to the penalty phase. The Commonwealth of Pennsylvania may conduct a new sentencing hearing in a manner consistent with this opinion within 120 days of this Order, or shall sentence Banks to life imprisonment.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

GEORGE E. BANKS, Petitioner	:	NO. 4:CV-99-0438
v.	:	(Jugde McClure)
MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; JAMES E. PRICE, Superintendent of State Correctional Institution at Greene: and RAYMOND COLLERAN, Superintendent of State Correctional Institute at Waymart; COMMONOF PENNSYLVANIA, Respondents	:	

ORDER

FILED: September 16, 1999

BACKGROUND:

On March 22, 1999, petitioner George E. Banks, an inmate at the State Correctional Institution at Waymart, Wayne County, Pennsylvania, commenced this action with the filing of a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Banks was convicted in 1983 of twelve counts of first-degree murder, one count of third-degree murder, one count of attempted murder, and one count of robbery. Twelve consecutive sentences of death, plus a consecutive sentence of 25 to 50 years total incarceration,

were imposed by the Court of Common Pleas of Luzerne County, Pennsylvania.

Banks has been granted leave to proceed *in forma pauperis*, counsel has been appointed, and a stay of a previously scheduled execution has issued.

On March 31, 1999, on initial review under Rule 4 of the Rules Governing Section 2254 Cases in the U.S. District Courts, 28 U.S.C. following § 2254, we issued a rule to show cause why four of Banks' claims should not be dismissed as procedurally barred. By Memoraum and Order of Court dated May 7, 1999, we dismissed those four claims as procedurally barred. *See Banks v. Horn*, 49 F. Supp. 2d 400 (M.D. Pa. 1999). Banks withdrew a claim in his brief in support of the petition. On August 18, 1999, we issued a memorandum and order denying the petition. *Banks v. Horn*, 1999 WL 636595 (M.D. Pa. Aug. 18, 1999).

Before the court is Banks' motion for reconsideration of the latter memorandum and order.

DISCUSSION:

I. STANDARD

"The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985) (citations omitted), *cert. denied*, 476 U.S. 1171 (1986). "Therefore, a court may properly grant a party's motion for reconsideration in any of the following circumstances: '(1) the development of any intervening change in the law, (2) the emergence of new evidence not previously available, or (3) the need to correct a clear error of law or

prevent a manifest injustice.'" *In re TMI Litigation Cases Consolidated II*, 922 F. Supp. 997, 1008 (M.D. Pa. 1996) (Rambo, then C.J.; quoting *Cohen v. Austin*, 869 F. Supp. 320, 321 (E.D. Pa 1994); citations omitted in *In re TMI*). The granting of a motion to reconsider is an extraordinary remedy and a court should not do so when the motion is merely a re-styling or rehash of issues previously presented. *McConocha v. Blue Cross and Blue Shield Mutual of Ohio*, 930 F. Supp. 1182, 1184 (N.D. Ohio 1996). A court should consider neither new evidence nor a new legal theory which could have been presented on the original motion, taking into account due diligence. *Id.* Mere disagreement with the court is a ground for an appeal, not a motion for reconsideration. *Id.*

II. ISSUE AS TO WHICH RECONSIDERATION IS SOUGHT

The issue as to which Banks seeks reconsideration is the ground of relief numbered (6) in his petition:

> The trial court's instructions to the jury in the sentencing phase, the verdict slip, and the jury poll required the jury to unanimously find both aggravating and mitigating circumstances in violation of the defendant's Eighth Amendment right to protection from cruel and unusual punishment.

See 1999 W.L. 636595 at *1. The principle underlying this claim is the holding of *Mills v. Maryland*, 486 U.S. 367 (1988). *See also McKoy v. North Carolina*, 494 U.S. 433 (1990).

In *Frey v. Fulcomer*, 132 F.3d 916, 924 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 2076 (1998), the Third Circuit

reviewed a jury charge similar to that challenged by Banks and concluded that it violated the rule of *Mills*. In our previous memorandum, we concluded that *Frey* does not apply because it involved a petition filed before the amendments to § 2254 under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1214.[1] Under AEDPA, habeas relief is warranted if the state court decision resulted in a decision that was contrary to, or involved an unreasonable application of clearly established precedent of the Supreme Court of the United States. 1999 WL 636595, at *16 (citing 28 U.S.C. § 2254(d)(1)[]). Since *Mills* was decided in 1988, and Banks was convicted in 1983, we concluded that the rule of *Mills* was not clearly established at the time that the state court made its ruling on the issue.

III. REVIEW OF THE ISSUE

Banks may be correct, at least in part, as to the time of the state court decision. The applicable statutory provision reads:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in

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[1] We held that the standards recited in AEDPA govern Banks' petition. Banks argued that because he filed a petition before AEDPA became effective (that petition was dismissed as a mixed petition as directed by the Third Circuit), pre-AEDPA standards governed the instant petition. The Third Circuit since has held that AEDPA governs in such circumstances. *Hull v. Kyler*, No. 97-7551, slip op. at 22-24 (3d Cir. filed Aug. 23, 1999).

> State court proceedings unless the adjudication of the claim --
>
> > (1) resulted in a decision that was contrary to or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;
> >
> > . . .

28 U.S.C. § 2254(d)(1).

The question is the time at which the federal law must have been clearly established, at the time of the "adjudication" or the time of the "decision." An attempt to answer this question involves opening a can of worms, and those worms are remarkably squiggly.

One reading of this language would lead one to conclude that the "decision" is the holding after "adjudication on the merits" of the constitutional issue, meaning that the time of the "decision" would be the same as the time that the "adjudication on the merits" is complete. However, one also can read "decision" to mean the final judgment. Given the overall purpose of AEDPA to limit the scope of federal review of the final judgments of state courts, this reading becomes more reasonable.

Yet another reading of "decision" is the ruling made by the first court considering the issue at the time it must be raised. In this instance, that could be the trial judge's ruling on the jury charge, verdict slip, and jury poll; if an erroneous ruling at that time constitutes plain error, it could be (again) the time the judgment becomes final.

This case is an example of why one of these alternate readings of "decision" is reasonable. The issue was not raised in the state courts (via PCRA petition) until February of 1989. *Commonwealth v. Banks*, 656 A.2d 467, 469 (Pa. 1995) (citations for subsequent history omitted). The Supreme Court of Pennsylvania ruled on the issue in 1995. *Id.* at 470-472. Yet Banks' argument brings the applicable time frame forward twelve years from the time that the trial court should have been presented with the issue and eight years after the judgment became final by the denial of *certiorari* by the Supreme Court of the United States.

Complicating this analysis is whether an erroneous holding in 1995 would mean that the sentence of death in 1983 violated the Constitution. That is, the Supreme Court decided *Mills* in 1988, after Banks' judgment became final. *Mills* therefore would mean that Banks' sentence was unconstitutional only if *Mills* was retroactive. Thus, the Supreme Court of Pennsylvania's application of *Mills*, if erroneous, would not necessarily render the sentence unconstitutional.

Fortunately, we need not immerse ourselves in the squiggly worms. As we noted, 1999 WL 636595 at *17, *Mills* does not require an outcome different from that reached by the state courts. Since a number of courts have ruled that language substantially similar (in some cases, nearly identical) to that used in the challenged jury instruction, does not violate the rule of *Mills*, we concluded that the state courts' decision was not an unreasonable application of Supreme Court precedent. 1999 WL 636595 at *15-*16.

Banks cites *Jermyn v. Horn*, 1998 WL 754567 (M.D. Pa. Oct. 27, 1998) (Caldwell, J.; currently before the Third Circuit); as conflicting with our decision. He is correct, but again, only to a certain extent. In that case, reviewing

language substantially similar to that involved in this case, Judge Caldwell concluded that the respondents had not persuaded him that the state court adjudication was a reasonable application of *Mills* and *McKoy*. *Jermyn* at *45. However, he also noted:

> The respondents maintain that the state supreme court's decision is a reasonable application of United States Supreme Court law in this area. However, they cite no Supreme Court precedent dealing with the jury instructions at issue nor do they cite cases from other Circuits that might be contrary to the Third Circuit's decision in *Frey*.

Id. at *44. In this case, we have cited (albeit as products of our own research) a number of such opinons.[2] Otherwise, we join the Supreme Court of Pennsylvania and the other courts we cited on the issue and simply disagree with Judge Caldwell on the issue.

In short, the motion for reconsideration will be denied, since it reflects disagreement with our holding, not a change in the law, new evidence, or plain error of law.

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[2] One case cited by Judge Caldwell for purposes of the issue of retroactivity is *DeShields v. Snyder*, 829 F. Supp. 676 (D. Del. 1993), which the Third Circuit called a "thoughtful opinion" in *Frey*. *Jermyn* at *37 (citing *Frey* at 920 n. 4). *DeShields* is one of the opinions we cited as having a similar instruction as the one at issue in this case.

NOW, THEREFORE, IT IS ORDERED THAT petitioner George E. Banks' motion (record document no. 26) for reconsideration is denied.

/s/
James F. McClure, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

GEORGE E. BANKS, Petitioner	:	NO. 4:CV-99-0438
v.	:	
MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; JAMES E. PRICE, Superintendent of State Correctional Institution at Greene: and RAYMOND COLLERAN, Superintendent of State Correctional Institute at Waymart; COMMON-OF PENNSYLVANIA, Respondents	:	

MEMORANDUM

McCLURE, District Judge — August 18, 1999

BACKGROUND:

On March 22, 1999, petitioner George E. Banks, an inmate at the State Correctional Institution at Waymart, Wayne County, Pennsylvania, commenced this action with the filing of a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. According to the petition, Banks was convicted in 1983 of twelve counts of first-degree murder, one count of third-degree murder, one count of attempted murder, and one count of robbery. Twelve consecutive sentences of death, plus a consecutive sentence of 25 to 50 years

total incarceration, were imposed by the Court of Common Pleas of Luzerne County, Pennsylvania.

Banks has been granted leave to proceed *in forma pauperis*, counsel has been appointed, and a stay of a previously scheduled execution has issued.

On March 31, 1999, on initial review under Rule 4 of the Rules Governing Section 2254 Cases in the U.S. District Courts, 28 U.S.C. following § 2254, we issued a rule to show cause why four of Banks' claims should not be dismissed as procedurally barred. By Memorandum and Order dated May 7, 1999,[1] we dismissed those four claims as procedurally barred. In his brief, Banks has withdrawn his eighth claim. Brief in Support of Petition for Writ of Habeas Corpus at 14.

The remaining grounds for relief asserted by Banks, numbered as in the petition, are:

(1) The defendant did not effect a knowing, intelligent and voluntary waiver of his Sixth Amendment right to assistance of counsel.

(2) The defendant was not competent to waive his Sixth Amendment right to assistance of counsel.

(3) The defendant did not effect a knowing, intelligent and voluntary waiver of his Fifth Amendment right against self-incrimination.

(4) The defendant was not competent to waive his Fifth Amendment right to protection from self-incrimination.

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[1] To be published as *Banks v. Horn*, 49 F.Supp.2d 400 (M.D.Pa.1999), and currently available at 1999 WL 288531.

(5) The defendant was not competent to be tried, convicted and sentenced to death.

(6) The trial court's instructions to the jury in the sentencing phase, the verdict slip, and the jury poll required the jury to unanimously find both aggravating and mitigating circumstances in violation of the defendant's Eighth Amendment right to protection from cruel and unusual punishment.

(10) Pennsylvania's proportionality review statute deprives a defendant of due process of law under the Fourteenth Amendment.

The parties were provided with a briefing schedule, and all briefs have been submitted. The matter is now ripe for disposition.

Banks also has filed a motion to amend the petition to add a claim that he is not competent to be executed. The motion will be denied because, as Banks himself notes, it is not ripe for adjudication. Also, the claim has not been exhausted. The claim therefore is subject to dismissal and amendment would be futile. The motion to amend the petition will be denied.

DISCUSSION:

I. STATEMENT OF FACTS[2]

On the evening of September 24, 1982, Banks attended a birthday party in Wilkes-Barre. He was accompanied to the party by two girlfriends, and a third girlfriend was in attendance as well. Banks was at the party from approximately 9:00 until about 10:30 p.m. Between midnight and 1:00 a.m. of September 25, 1982, Banks called the location of the party and spoke to one of his girlfriends, Dorothy Lyons. Lyons was visibly upset by the call and left the party, accompanied by the last of Banks' girlfriends still in attendance. She took with her an AR-15 rifle belonging to Banks, apparently at Banks' request. The Colt AR-15 rifle is a military style, semi-automatic weapon, a civilian version of the M-16 used by American servicemen.

Shortly after 1:00 a.m., Banks was seen at a complex in which Lyons had an apartment. He was carrying a bag containing several small boxes, and commented to the witness who saw him that he (the witness) should not surprise people because he might get shot.

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[2] This summary of the facts is that set forth in an earlier memorandum, when this case was before this court initially. *Banks v. Horn*, 939 F.Supp. 1165, 1169-1170 (M.D.Pa. 1996). We repeat the statement because, obviously, the facts have not changed. A more thorough recitation of the facts is set forth in the first opinion of the Supreme Court of Pennsylvania in this matter. *Commonwealth v. Banks*, 513 Pa. 318, 324-335, 521 A.2d 1, 3-9 (1987). This case has a complicated procedural history, recited below. For the sake of simplicity, subsequent history is not provided in citations to prior related opinions.

Banks was next seen on Schoolhouse Lane in Wilkes-Barre by a group of young people on the street. (Although referred to as "teenagers" by the Supreme Court of Pennsylvania, only one of the members of this group can have been a teenager at the time of the shootings. The two victims were aged 23 and 24, and a woman who was not shot was 21 at the time of trial. The remaining person present (a man) was 20 at the time of trial.) Banks owned a home at 28 Schoolhouse Lane in which noises like gunshots were heard by the youths at about 2:00 a.m. Banks appeared on the street wearing coveralls which witnesses consistently described as appearing to be of a military appearance. One of the youths stated that he knew Banks, to which Banks responded that he was "not going to live to tell anybody about this," and shot two of the youths. One of them survived but the other was pronounced dead later that morning.

When police were summoned to the scene, they called for an ambulance. Also, they were told about the sound of gunfire from 28 Schoolhouse Lane and went there to investigate. Inside they found the lifeless bodies of the three girlfriends of Banks who had been at the party as well as their five children, four of whom were fathered by Banks. All had gunshot wounds.

Banks was next seen in the vicinity of a lounge called the Cabaret. Two men were in their cars talking when Banks approached, in the same outfit, and pointed the AR-15 at the head of one of the men. Banks demanded that the man move over and got into the car. Banks let the owner out after a short distance but left with the car.

At about 2:30 a.m. shots were heard at the Heather Highlands Trailer Park in Jenkins Township, Luzerne County. Two boys present in one of the trailers described

how Banks entered the trailer and grabbed Sharon Mazzillo (another girlfriend) with one arm while holding the AR-15 in the other. Banks said something like, "I shot some of my family, now I'm going to shoot some of yours." He then shot his son by Sharon, Kissmayu Banks, who was asleep on the couch. Sharon and her mother, Alice Mazzillo, then tried to push Banks out of the trailer, and Alice went to the bedroom to call police. Banks shot Sharon as she tried to run out the door of the trailer. Banks next choked, shot and kicked Scott Mazzillo, then struck him with the butt of the rifle. Finally, Banks shot Alice and left. One of the two boys left alive by Banks lifted the phone from Alice's body and completed the call to the police.

Banks later was tracked to his mother's home, but left before police arrived. Eventually, Banks was located in the home of a friend, having barricaded himself inside. Police surrounded the house but did not enter since Banks still had the AR-15 and was suspected of having hand grenades. Police tried to convince Banks that his children were still alive and needed his help. After more than four hours, Banks was talked out of the house and taken into custody. He made numerous statements admitting to the shootings.

Explaining conduct like that of Banks probably can never be done adequately. At trial, the Commonwealth took the position that Banks was motivated by a fear that he was losing control over his "family." Defense counsel presented psychiatric experts who testified that Banks suffered from paranoid psychosis. Succinctly stated, the experts testified that Banks, who is biracial, believed that he was the victim of a racist conspiracy. There was evidence also that Banks had made statements to the effect that he did not want his children to grow up in a racist world, and killed them to save them from suffering the effects of racism as Banks had.

II. PROCEDURAL HISTORY

As indicated above, *see* Note 2, this case has been before this court previously. To place the matter into context, since the resolution of Banks' claims is affected, we will provide a procedural history of the case. A chronology of some of the more important events of this case is appended to this opinion as Court's Appendix I.

After Banks was convicted in the Court of Common Pleas of Luzerne County, he pursued a direct appeal to the Supreme Court of Pennsylvania, which affirmed. *Commonwealth v. Banks*, 513 Pa. 318, 521 A.2d 1 (1987) (*Banks I*). The Supreme Court of the United States denied a petition for certiorari. *Banks v. Pennsylvania*, 484 U.S. 873, 108 S.Ct. 211, 98 L.Ed.2d 162 (1987). Banks then sought post-conviction, collateral relief in the Court of Common Pleas under the Pennsylvania Post Conviction Hearing Act which was considered under the Post Conviction Relief Act (PCRA), 42 Pa.Cons.Stat.Ann. §§ 9541 et seq., which had become effective; the denial of relief was affirmed by the Supreme Court of Pennsylvania. *Commonwealth v. Banks*, 540 Pa. 143, 656 A.2d 467 (1995) (*Banks II*). The Supreme Court of the United States again denied a petition for certiorari. *Banks v. Pennsylvania*, 516 U.S. 835, 116 S.Ct. 113, 133 L.Ed.2d 65 (1995).

After Pennsylvania Governor Thomas Ridge signed a death warrant for execution during the week of March 3, 1996, Banks filed with this court, *inter alia*, a motion to stay execution. We granted that motion and Banks filed a petition for a writ of habeas corpus under § 2254. We denied a motion to dismiss the petition as a mixed petition, finding that unexhausted claims were procedurally barred in the Pennsylvania courts. *Banks v. Horn*, 928 F.Supp. 512

(M.D.Pa. 1996) (*Banks III*). *See also Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982) (mixed petition is one with both exhausted and unexhausted claims, and must be dismissed); *Toulson v. Beyer*, 987 F.2d 984 (3d Cir. 1993) (if unexhausted claims are procedurally barred in state court, district court must dismiss unexhausted claims and consider merits of exhausted claims, but state law must clearly foreclose consideration of unexhausted claims). We then considered the merits of Banks' remaining claims and denied the petition. *Banks v. Horn*, 939 F.Supp. 1165 (M.D.Pa. 1996) (*Banks IV*).

The Third Circuit reversed and remanded for dismissal of the petition as mixed, finding that Pennsylvania law did not clearly foreclose consideration of the unexhausted claims. *Banks v. Horn*, 126 F.3d 206 (3d Cir. 1997) (*Banks V*). While the case was pending before the Third Circuit, Banks filed a second petition under the PCRA in the Court of Common Pleas, which denied relief. The Supreme Court of Pennsylvania affirmed the denial of relief, not for the reasons recited by the Court of Common Pleas, but instead finding that the second petition was time-barred under the amended version of the PCRA. *Commonwealth v. Banks*, 726 A.2d 374 (Pa. 1999) (*Banks VI*).

After Governor Ridge again signed a death warrant, Banks brought the instant petition under § 2254, and a stay of execution again has issued. As noted above, *see* "BACKGROUND" and *Banks v. Horn*, 49 F.Supp.2d 400 (M.D.Pa. 1999) (*Banks VII*), we have dismissed four of Banks' claims as procedurally barred under state law, and the petition no longer is a mixed petition.

III. TIMELINESS

Respondents argue that Banks' petition is untimely under the one-year limitations period permitted for bringing a § 2254 petition after passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 104-132, 110 Stat. 1214. The relevant provision reads:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

According to respondents, Banks' judgment of conviction and sentence became final in 1987, when the Supreme Court of Pennsylvania affirmed on direct appeal and the Supreme Court of the United States denied certiorari. In *Burns v. Morton*, 134 F.3d 109 (3d Cir. 1998), however, the Third Circuit held that petitioners must be afforded at least one year from the effective date of AEDPA before § 2244(d)(1) will bar the petition because they did not have notice of the limitation until AEDPA's effective date. Thus, the limitations period within which Banks was required to file a petition did not begin until at least April 24, 1996.

In addition, the Third Circuit has held that the time limit established by § 2244(d)(1) is a statute of limitations subject to equitable tolling. *Miller v. N.J. State Dept. of Corrections*, 145 F.3d 616 (3d Cir. 1998).

On April 24, 1996, there were proceedings already pending in this court, and the matter went to the Third Circuit. The Third Circuit issued its opinion remanding to this court on September 19, 1997 (*Banks V*); we received a certified copy of the Third Circuit's judgment on October 17, 1997, and dismissed the action pursuant to that judgment on October 24, 1997. We think it evident that the time before October 24, 1997, is excluded from the period of limitations because a petition actually was pending in federal court during that time. The proceedings related to Banks' second

PCRA petition were pending when the Third Circuit issued its order remanding for dismissal. Those proceedings ended when the Supreme Court issued its opinion, *Banks VI*, on March 2, 1999. The instant proceedings began on March 22, 1999.

Respondents rely on *Lovasz v. Vaughn*, 134 F.3d 146 (3d Cir. 1998), in which the Third Circuit considered the tolling provision of § 2244(d)(2). Under that provision, the period during which a "properly filed" petition for collateral review is pending is not counted for purposes of § 2244(d)'s limitations period. The question becomes, then, whether the limitations period was tolled after the prior case in this court was dismissed and during the pendency of Banks' second PCRA petition, or between October 24, 1997, and March 2, 1999. More succinctly and directly stated, was Banks' second PCRA petition "properly filed"? According to respondents, it was not, because a petition must be timely to be properly filed. *Lovasz* at 147.

In our memorandum issued May 7, 1999 (*Banks VII*), we discussed the adequacy of the state grounds barring consideration of the four unexhausted claims asserted by Banks. 49 F.Supp.2d 400, 403-06. We noted that a ground is inadequate if, at the time an action must be taken by the petitioner to preserve a claim or claims, the rule is not clearly established. *Id.* at 403-04. If a rule is changed without notice to potential petitioners and bars consideration in state court of a claim which could have been considered prior to the change, such as by changing the time at which a claim must be raised after that time has passed, the ground is not adequate to

support the judgment. *Id.* at 404-05 (relying on *Ford v. Georgia*, 498 U.S. 411, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991)).[3]

There are two important points to consider in reviewing respondents' argument. First, although the statute reviewed by the Supreme Court in *Banks* VI, 42 Pa.Cons. Stat.Ann. § 9545, is captioned "Jurisdiction and proceedings," it is not entirely clear that the subsection setting forth the time limit for filing a PCRA petition and exceptions thereto is intended to be jurisdictional in nature. The first subsection states that original jurisdiction is in the Court of Common Pleas. Sec. 9545(a). The third subsection puts a limit on the jurisdiction of the state courts to issue a stay of execution, using standard jurisdictional language ("No court shall have the authority..."). Sec. 9545(c). The fourth subsection sets forth standards governing admissibility of evidence, discovery, and privilege during and relating to an evidentiary hearing. Sec. 9545(d). The latter normally are not considered jurisdictional matters

In contrast, the limitations subsection states that a petition "shall be filed within one year of the date the judgment becomes final, . . ." with certain exceptions. Sec. 9545(b)(1).[4] The subsection does not state that no court will

[3] Unlike the defendant in *Ford*, Banks had sixty days after the rule change (in the form of the amendment of the PCRA) to assert his claims. We therefore found the state grounds were adequate as a procedural bar. *Id.* at *4-*5 and *5 n. 2.

[4] The subsection reads in full:

(b) Time for filing petition --

(Continued)

(Continued)

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petition proves that:

(i) the failure to raise the claim previously was the result of interference with the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

(3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States or the Supreme Court of Pennsylvania, or at the expiration of time for seeking such review.

(4) For purposes of this subchapter, "government officials" shall not include defense counsel, whether

(Continued)

have the authority to entertain an untimely petition. Thus, since (1) not every subsection of the statute is jurisdictional in nature, and (2) the limitations subsection does not invoke clear language of jurisdiction, it cannot be said that § 9545(b) is necessarily jurisdictional in nature, as opposed to a statute of limitations subject to equitable tolling. *Cf. Miller* at 618 (AEDPA time limit statute of limitations subject to equitable tolling because term "jurisdiction" not used); *Calderon v. U.S. Dist. Court for C.D. of Calif.*, 128 F.3d 1283, 1288 (9th Cir. 1997) (Kozinski, J.; opinion on which Third Circuit relied in *Miller*, also finding that failure to use language of jurisdiction indicates statute of limitations subject to equitable tolling), *reh'g, reh'g en banc denied, cert. denied*, 522 U.S. 1099, 118 S.Ct. 899, 139 L.Ed.2d 884 (1998).[5] That it is entirely reasonable to conclude that § 9545(b) is a statute of limitations rather than a jurisdictional provision is reflected in *Lambert v. Blackwell*, 134 F.3d 506, 523-524 (3d Cir. 1997), in which the provision was so denominated.

The second point is that, prior to considering second petitions in the context of the amended version of the PCRA, the Supreme Court had applied a "relaxed waiver" standard for preserving issues for review in capital cases. *Banks VI* at 376 (citing *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 454 A.2d 937 (1982); *Commonwealth v. Beasley*, 544 Pa. 554,

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(Continued)

appointed or retained.

42 Pa.Cons.Stat.Ann. § 9545(b).

[5] The Ninth Circuit has overruled its prior opinion in *Calderon* but not for the reasons for which the Third Circuit cited the opinion. *Calderon v. U.S. Dist. Court for C.D. of Calif.*, 163 F.3d 530 (9th Cir. 1998) (en banc).

678 A.2d 773 (1996), *cert. denied*, 520 U.S. 1121, 117 S.Ct. 1257, 137 L.Ed.2d 337 (1997)). Because it found the amended version of § 9545(b) to be jurisdictional in nature, however, it declined to apply (actually, without jurisdiction, it could not apply) the relaxed waiver standard in Banks' case. *Id.*[6]

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[6] The Supreme Court of Pennsylvania cited *Commonwealth v. Peterkin*, 554 Pa. 547, 722 A.2d 638 (1998), *reargument denied*, for the proposition that, as a matter of jurisdiction, a PCRA petition must be filed within one year of final judgment. *Banks VI* at 376. While there is language in Peterkin to that effect, the holding is not altogether clear. The first reference to such a holding is the Supreme Court's recitation of the Commonwealth's position that the PCRA court lacked jurisdiction because the petition was untimely. *Id.* at 639. The next reference is the Supreme Court's quotation of § 9545(b)(1), including the caption of the section. *Id.* at 640. Finally, the Supreme Court stated, "As noted, on November 17, 1995, the General Assembly amended the PCRA to require that, as a matter of jurisdiction, a PCRA petition must be filed within one year of final judgment: . . ."; it then quoted § 9545 (b)(1), (3), again with the caption. *Id.* at 641. Otherwise, the opinion is written in terms of the statutory exceptions to the one-year limitation period and the need for finality. No explanation is provided as to why the limitation is jurisdictional as opposed to a statute of limitations (or, to use the language of the caption, why "jurisdiction" applies and "proceedings" does not). Also, the future non-applicability of any form of the relaxed waiver rule is not discussed.

We conclude from all of this that *Peterkin*, unlike *Banks VI*, is not sufficiently clear to establish the jurisdictional nature of the one-year limitation rule to end the equitable tolling of Banks' limitations period. Even if it did, of course, since *Peterkin* was issued December 21, 1998, with reargument denied February 17, 1999, the period between December 21, 1998 (assuming the ear-

(Continued)

Based on the foregoing, we do not think that, prior to the holding of the Supreme Court in *Banks VI*, Banks can be said to have had notice that § 9545(b) would be considered jurisdictional in nature. Only at the time of that ruling can it be said with certainty that Banks would be absolutely barred from presenting his unexhausted claims to the state courts on the basis of jurisdiction which, from respondents' point of view, also would mean that Banks had forfeited, without notice, his exhausted claims. We conclude that this would not be an adequate state ground or, at least, would be a reason for equitable tolling of § 2244(d)'s limitations period. We emphasize that the tolling of the limitations period is equitable, not the statutory tolling for which § 2244(d)(2) provides.

Of course, this must be contrasted with our earlier holding concerning the unexhausted claims (*Banks VII*). In that instance, Banks had sixty days' notice that the limitations period of § 9545(b) would become effective and might well bar his second PCRA petition, regardless of whether the basis was found to be jurisdictional or simply expiration of the limitations period and no basis for tolling. The prior notice is what supports the state law ground, i.e. makes it adequate, and bars presentation of the unexhausted claims in this court.

In our holding, we reach the same conclusion as was reached in *Fidtler v. Gillis*, 1999 WL 450337 (E.D.Pa. June

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(Continued)

lier date applies), and March 22, 1999, still would not have exceeded the one year allowed before bringing the petition in this court.

29, 1999), though by a different analysis.[7] In that case, the court found that the petitioner's claims in a petition under § 2254 had not been exhausted but might be barred by § 9545 (b)(1).[8] Relying on cases decided prior to *Banks VI*, *see Fidtler* at *5-*6 (citing *Lambert*; *Commonwealth v. Alcorn*, 703 A.2d 1054, 1057 (Pa.Super. 1997), *allocatur denied*, 555 Pa. 711, 724 A.2d 348 (1998) (table); *Commonwealth v. Ferguson*, 722 A.2d 177, 179 (Pa.Super. 1998); *Commonwealth v. Austin*, 721 A.2d 375, 377 (Pa.Super. 1998), *allocatur denied*, 1999 WL 266268 (Pa. May 04, 1999) (table); *Banks V*), the court dismissed the case so that the operation of § 9545(b) could be determined by the state courts in the first instance. However, because the petitioner's exhausted claims might be barred (as through taking more than a year to exhaust), the court dismissed without prejudice. In this way, the filing date of an amended petition would relate back to the date of the filing of the original petition under Fed.R. Civ.P. 15(c)(2), and the one-year bar could be avoided. *Id.* at 211-12.[9]

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[7] The difference in the analysis stems from the fact that this court previously dismissed a § 2254 petition pursuant to an order of the Court of Appeals and now is considering the second petition, while the court in *Fidtler* was considering the petition at the time of dismissal. Also, unlike the court in *Fidtler*, we are presented with an instance in which a second PCRA petition clearly is barred because the state courts already have so held. The court in *Fidtler* does not mention the applicability of *Banks VI* (that § 9545(b) is jurisdictional) to the facts before it.

[8] Which the court denominated a "statute of limitations."

[9] The Third Circuit discussed a similar problem in *Morris v. Horn*, No. 98-9008 (3d Cir. Aug. 9, 1999), a slip opinion which was received in this court after the drafting of this opinion.

(Continued)

In other words, the court found that it would be unfair to require exhaustion only to have the time necessary for exhaustion lead to a bar of the petitioner's claims. This is especially so when there is a possibility that one or more of the exceptions to the jurisdictional time bar may apply. The *Fidtler* court therefore used the vehicle of dismissal without prejudice to avoid the statutory bar and resulting unfairness. In this case, we have determined that the limitations period was equitably tolled during the time that Banks' second PCRA petition was pending. Thus, the unfairness of not permitting a petitioner to present exhausted claims based on a time limitation which expires during a required attempt to exhaust other claims is avoided.

In short, we find that the statute of limitations under § 2244(d) was tolled during the period between October 24, 1997, and March 2, 1999. However, we limit our holding to the facts of this case, since the Supreme Court of Pennsylvania now has provided notice that § 9545(b) is to be read as a jurisdictional limit and not subject to relaxed waiver. Thus, the filing of an untimely PCRA petition would not toll the limitations period under § 2244(d) in every case.

(Continued)

Morris was granted an order similar to that in *Fidtler*. The Third Circuit indicated that, if the second PCRA petition was found to be untimely and the "relation back" strategy was found to be invalid, the entire time that the second PCRA petition was pending was not tolled under § 2244(d)(2). *Id.* at 7. The Third Circuit indicated, however, that it was not deciding the question of equitable tolling, *id.* at 14 n. 5, the basis for our ruling in this case.

IV. STANDARD

The amended version of § 2254, which sets forth a more stringent standard for issuance of the writ, although not applicable to Banks' earlier petition, is now applicable because the instant petition was filed after the effective date of AEDPA. We note initially that we reject Banks' contention that pre-AEDPA standards govern because he filed an earlier petition that was dismissed as a mixed petition. Banks cites *Christy v. Horn*, 115 F.3d 201, 208 (3d Cir. 1997), for the proposition that a petition which is filed after a prior petition was dismissed for failure to exhaust is not a second or successive petition. This very principle contradicts Banks' next argument, that his petition is a "continuation" of the proceedings related to his prior petition in this court. Actually, the point of *Christy* is that, once a petitioner has exhausted all of his state remedies and files a petition under § 2254, that petition is a "first" petition for purposes of the district court's authority to entertain the petition without prior approval of the court of appeals. *See* 28 U.S.C. § 2244(b)(3).

The same is true of *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998), on which Banks also relies. In that case, the Supreme Court equated a claim dismissed as unripe with a claim dismissed as unexhausted for purposes of whether a petition asserting the claim was a second or successive petition for purposes of § 2244. Thus, when the petitioner's claim that he was incompetent to be executed (dismissed initially by the district court as unripe) was presented later, the petition was to be considered a "first" petition and no authorization from a court of appeals was necessary.

Banks points to language in *Stewart* which says, "A court where such a petition was filed could adjudicate these

claims under the same standard as would govern any other first petition." 118 S.Ct. at 1622. Actually, any other first petition would be governed by the standards enacted in AEDPA.

Nothing in *Stewart*, *Christy*, or AEDPA indicates that pre-AEDPA law applies in cases in which the petitioner has had a prior petition dismissed for failure to exhaust. On March 22, 1999, when Banks filed the instant petition, which must be deemed his "first" petition under 28 U.S.C. § 2244(b)(3), AEDPA was in effect and AEDPA principles apply.

The relevant provisions now read:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.
>
> (e)(1) In a proceeding initiated by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a

> factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(d), (e)(1). Also, the circumstances which would warrant an evidentiary hearing in the habeas court are strictly limited under 28 U.S.C. § 2254(e)(2).

Since AEDPA was passed, the state court decision is the starting point in habeas review. *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 885 (3d Cir. 1999). Section 2254(d) sets forth two conditions (subsections (d)(1) and (d)(2)), at least one of which must be met before habeas relief may be granted. *Id.* at 887. Examination of the first of these conditions entails a two-step analysis.

Before granting relief under § 2254(d)(1) for a state court adjudication of a claim "contrary to" established federal law as established by the Supreme Court, the habeas court first must "identify the applicable Supreme Court precedent and determine whether it resolves the petitioner's claim." *Id.* at 888. "[T]his analysis requires 'something more than a recognition that the Supreme Court has articulated a general standard that covers the claim.'" *Id.* (quoting *O'Brien v. Dubois*, 145 F.3d 16, 24 (1st Cir. 1998)). Rather, the petitioner must show that "'Supreme Court precedent requires an outcome contrary to that reached by the relevant state court.'" *Id.* (quoting *O'Brien* at 24-25). The Supreme Court precedent need not be factually identical to the petitioner's case, but must be a rule which, by virtue of factual similarity or distillation of general precepts into a channeled mode of analysis intended for application to variant factual situations, can fairly be said to require a particular result in the petitioner's case. *Id.* at 888-889.

If the state court decision was not "contrary to" applicable Supreme Court precedent, then the federal habeas court must determine whether the state court decision was based on an "unreasonable application of" established Supreme Court precedent. *Id.* at 889. An "unreasonable application" is not one with which the habeas court disagrees or one which leads to a different result than the habeas court would reach on its own. *Id.* Rather, the "question is whether the state court's application of Supreme Court precedent was objectively unreasonable." *Id.* at 889-890. Under this standard, habeas relief is not warranted "unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." *Id.* at 890. While it is Supreme Court precedent that supplies the applicable rule, thereby precluding consideration of the opinions of lower federal courts on questions not addressed by the Supreme Court, a habeas court may consider lower federal court decisions in determining the reasonableness of the state court's application of Supreme Court precedent, that is, as helpful amplifications of Supreme Court precedent. *Id.*

Prior to the passage of AEDPA, there was a presumption in habeas corpus proceedings that factual determinations by a state court were correct. *Jackson v. Byrd*, 105 F.3d 145, 147 (3d Cir.), *reh'g denied, cert. denied*, 520 U.S. 1268, 117 S.Ct. 2442, 138 L.Ed.2d 201 (1997).[10] Since AEDPA was

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[10] The Third Circuit has yet to address the standard for federal habeas review of factual findings by the state courts. Each of its recent opinions under § 2254 involved petitions filed before the effective date of AEDPA, so that pre-amendment standards applied. *See Byrd* at 147; *Buehl v. Vaughn*, 166 F.3d 163,

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enacted, the presumption of correctness still applies but the quantum of proof necessary to rebut the presumption has been increased (to the "clear and convincing" standard), making it more difficult for the petitioner to do so. *Warren v. Smith*, 161 F.3d 358, 360-361 (6th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 2403, 144 L.Ed.2d 802 (1999); *Bressette v. N.Y. State Div. of Parole*, 2 F.Supp.2d 383, 386-387 (W.D.N.Y. 1998). Thus, federal courts on habeas review are required to give greater deference to factual determinations by state courts. *Bressette* at 387 (quoting, *inter alia*, *Ford v. Ahitow*, 104 F.3d 926, 936 (7th Cir. 1997); *Houchin v. Zavaras*, 107 F.3d 1465, 1470 (10th Cir. 1997)). The presumption applies to findings of fact by both the trial and appellate courts of the state. *Id.* at 386.

V. MENTAL COMPETENCY

Although not numbered first among the issues presented by Banks, we address first the question of Banks' mental competency at the time of trial because several of the claims flow from the competency issue.

Even before enactment of AEDPA, the Supreme Court of the United States held that a state court's finding of competency was a factual matter which is binding on a federal court unless the record does not support the finding. *Demosthenes v. Baal*, 495 U.S. 731, 735, 110 S.Ct. 2223, 109 L.Ed.2d 762 (1990) (per curiam). However, the duty to determine a defendant's mental competency continues

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168-169 (3d Cir.), *cert. dismissed*, ___ U.S. ___, 119 S.Ct. 2418, 144 L.Ed.2d 815 (1999); *Meyers v. Gillis*, 142 F.3d 664, 667 (3d Cir. 1998). Hereafter, then, we look to the language of the statute and opinions of other courts interpreting that language.

throughout trial, and a trial court must stop the trial and conduct a hearing when there are circumstances suggesting a change in the defendant's psyche rendering the defendant incompetent to stand trial. *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). Still, there is no constitutional requirement of a second or successive hearing absent evidence of a substantial change in the mental condition. *Senna v. Patrissi*, 5 F.3d 18, 20 (2d Cir. 1993).

A criminal defendant is competent to stand trial if he or she has the ability to consult with counsel to a reasonable degree of rational certainty and has a rational and factual understanding of the proceedings. *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (per curiam); *McFadden v. United States*, 814 F.2d 144, 146 (3d Cir. 1987).[11]

The trial court conducted a pre-trial hearing to determine whether Banks was competent to stand trial. The court's finding of competence was supported by the testimony of a psychiatrist called by the Commonwealth and therefore is supported by the record. Banks argues, however, that his mental condition deteriorated during trial until he became incompetent; that is, he decompensated during trial. We discussed this issue at length in *Banks IV*, and we believe that discussion continues to be applicable:

> As noted, the trial court made a pre-trial determination that Banks was mentally competent to stand trial. The court continued to observe Banks for signs that his condition with respect to competency had

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[11] This test is codified at 18 U.S.C. § 4243(a). The analogous provision under Pennsylvania law is codified at 50 Pa.Stat. Ann. § 7402(a).

changed. *See, e.g.*, N.T. trial vol. 2 at 454-455 (June 8, 1983) (noting that questioning by and demeanor of Banks established competency); vol. 5 at 1,645 (June 16, 1983) (noting that trial court had seen nothing to warrant change of mind with respect to competency determination); *Banks I* at 13 (reciting factual finding of trial court as to Banks' demeanor and participation as related to competency, also set forth in present record in Respondents' Appendix A (record document no. 33, Opinion dated October 17, 1985, at 15 n. 2)). Banks asked meaningful, at times very insightful, questions of witnesses. *See, e.g.*, N.T. trial vol. 2 at 888-889 (June 9, 1983) (eliciting testimony of firearms/ballistics expert that it was unlikely that ammunition from weapon used would be found in body because of its velocity, despite fact that fragments were found in the body). It also should be noted, as pointed out by Banks, that defense counsel repeatedly reminded the trial court of its duty to consider Banks' competency through a number of motions to suspend proceedings for another competency hearing.

Based on the foregoing, it is clear that the trial court remained mindful of its responsibility with respect to the determination of competency, and determined that Banks was mentally competent to stand trial.

The only evidence of a change in the mental condition of Banks during the course of the trial to which he points is the testimony of Park E. Dietz, M.D., a psychiatrist called by the Commonwealth on the issue of Banks' sanity at the time of the offenses. N.T. trial vol. 5 at 1,800-1,888; 1,890-1,932 (June 17,

1983). Specifically, Dr. Dietz testified on direct examination, in part, as follows:

> . . . I had the opportunity to observe Mr. Banks testify yesterday, and his testimony shows that he has paranoia, to me.
>
> I recognized, in his testimony, every one of the symptoms of his disease that has been discussed in the testimony I've heard. Yesterday Mr. Banks showed delusions and psychotic thought, which is really the symptom of this illness. And so, yesterday, I was able to observe that.
>
> He's been said to be on a deteriorating course, getting worse with this illness. Dr. Spodak testified, in a hearing that I attended last February 28, that Mr. Banks was deteriorating rapidly. And there's been testimony since then that Mr. Banks is deteriorating. Given that and given the fact that he's been psychotic since he was in prison, I think yesterday I had a chance to see him at his worst and to see all the symptoms that Mr. Banks shows when he is at his sickest.

Id. at 1,828. Dr. Dietz added later in his testimony on direct examination:

> Now, Mr. Banks was described by Dr. Turchetti as being more floridly psychotic in February than he had been back in October, at the original interviews, and I think that significant, because I've indicated to you that Mr.

> Banks seems to be worse now than he was in the past; that his behavior on the witness stand is, by all accounts, more seriously disordered than his behavior before the shootings and, in my opinion, at the time of the shootings, so the disorder, according to Dr. Turchetti, was worse in February than in October.

Id. at 1,835.

This testimony is consistent with all of the psychiatric testimony on the issue of whether Banks suffered from a mental disease or defect. That is, all of the psychiatrists agreed that Banks suffered from paranoia or paranoid psychosis, which is distinguishable from paranoid personality and paranoid schizophrenia. In the current version of the standard text on mental disorders, the disease described by the psychiatrists appears to be a "delusional disorder," subclassified as a "persecutory type." *Diagnostic and Statistical Manual of Mental Disorders* 296-298 (4th ed. 1994). Dr. Weatherly cited an earlier version in his testimony. N.T. competency hearing at 10 (May 6, 1983) (citing *Diagnostic and Statistical Manual Three*, or third edition, and diagnosing as "numerically number 297.10").

The differences in the testimony appear in the opinions of the psychiatrists with respect to the impact of the disease on Banks' cognitive abilities. During trial, the psychiatrists called by the defense opined that, as a result of the paranoia, Banks was unable to understand the nature and consequences of his actions or to distinguish right from wrong at the time of the offenses, while the Commonwealth's psychiatrists

reached the opposite conclusion (despite accepting the existence of the disease). In other words, the testimony was in conflict as to the effect of the disease on Banks' cognitive functions. *See esp.* N.T. trial vol. 5 at 1,828 (June 17, 1983) (testimony of Dr. Dietz that "... as for the effect on thinking, on judgment, on other areas of mental life, paranoia doesn't have an effect on those areas of mental life"). Moreover, Dr. Sadoff testified during the pre-trial competency hearing that Banks' paranoia did not render him incompetent to stand trial. N.T. competency hearing at 198 (March 15, 1983). There are, then, two problems with Banks' argument that the testimony of Dr. Dietz required the trial court to suspend the trial and conduct a full-blown competency hearing. First, Dr. Dietz was not testifying that Banks actually was deteriorating or decompensating; he was assuming as much based on previous testimony. Second, there is not necessarily a link between the disorder and mental competency to stand trial; in fact, the trial court had rejected such a link, supported by Dr. Sadoff's testimony, when it found Banks competent after the original hearing. Considering this evidence and accepting as true Banks' contention that his paranoia grew worse as trial approached and during trial, it does not follow that Banks was not competent.

We conclude that: (1) the trial court fulfilled its ongoing, constitutional obligation to ensure that Banks was competent to stand trial; (2) the trial court's determination that Banks was competent is supported by the record; and (3) the equivocal nature of the evidence on which Banks relies, weighed against the evidence of the ongoing observation of Banks by the trial court, makes the testimony of Dr.

> Dietz insufficient to rebut the presumption that the determination of competency was correct. In the language of *Drope*, there are no "circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." Based on this conclusion, we find that grounds (2) and (4) of Banks' petition do not warrant habeas relief.

Banks IV at 1171-1173. We reach the same conclusions at this time. In the terms now applicable under § 2254(d), the decision of the state courts in finding that Banks was competent did not result in a decision (1) contrary to or involving an unreasonable application of clearly established federal law or (2) based on an unreasonable factual determination in light of the evidence produced in the state court proceedings. The finding of competence leads to the denial of habeas relief for the claims numbered (2), (4), and (5).

VI. WAIVER OF RIGHT TO COUNSEL

The first claim asserted by Banks (numerically) is that he did not effect a knowing and voluntary waiver of the right to counsel under the Sixth Amendment. Actually, Banks never waived the right to counsel and continued to be represented throughout the course of the trial. However, he did participate to some extent in the conduct of his defense. Banks' participation included personally cross-examining the ballistics expert called by the Commonwealth, testifying in his own defense, and directing counsel as to questions on cross-examination of the coroner and deputy coroners during presentation of the Commonwealth's rebuttal evidence. During his own testimony, Banks introduced photographs into evidence which had been excluded by the trial court during the Commonwealth's case in chief.

Banks contends that, in allowing him to participate to such an extent in his defense, the trial court in effect allowed him to proceed *pro se* without conducting a colloquy as to whether the waiver of the right to counsel was knowing and voluntary. *See generally Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). Actually, Banks' participation in his defense constituted hybrid representation, which is a matter within the discretion of the trial court. *United States v. Einfeldt*, 138 F.3d 373, 378 (8th Cir.), *cert. denied*, 525 U.S. 851, 119 S.Ct. 126, 142 L.Ed.2d 102 (1998); *United States v. Treff*, 924 F.2d 975, 979 n. 6 (10th Cir.), *cert. denied*, 500 U.S. 958, 111 S.Ct. 2272, 114 L.Ed.2d 723 (1991).[12]

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[12] We do not attempt here to establish a bright line between proceeding *pro se* and hybrid representation. At least one commentator has discussed such a bright line, concluding that a *pro se* defendant conducts the entirety of the defense. If there is standby or advisory counsel (the terms apparently meant to be interchangeable), counsel is present in the courtroom but silent as to the presentation of the defense. Standby or advisory counsel's role is limited to providing technical advice, protecting the record for appeal, and being available to take over the case if the defendant waives the right to proceed *pro se*. Whenever counsel takes any active role in the defense, it is termed a hybrid defense. Note, *The Accused as Co-Counsel: The Case for the Hybrid Defense*, 12 Valparaiso L.Rev. 331, 331-332 (1978).

On the other hand, the Third Circuit in *Bontempo v. Fenton*, discussed in the text *infra*, held that a defendant was not required to waive the right to counsel because his own part in presenting the defense was merely supplemental to his counsel's representation. This holding can be taken to mean that the

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In *United States v. Leggett*, 81 F.3d 220, 223-226 (D.C.Cir. 1996), the defendant supplemented his counsel's questions with questions of his own, cross-examined three government witnesses, asked questions of two witnesses called by the defense, and made a closing argument after his own counsel's argument. Because Leggett did not forgo the right to counsel, instead supplementing representation by counsel, the District of Columbia Circuit held that he had not elected to proceed *pro se* and no colloquy was required. "Leggett wanted both the benefit of counsel and the ability to take the reins himself from time to time . . . and by dint of the court's indulgence, he had his cake and ate it too." *Id.* at 226 (citation omitted).

Banks argues, however, that a waiver of the right to counsel is required even in the instance of hybrid representation. In support of this proposition, he cites three cases from the Ninth Circuit, *United States v. Turnbull*, 888 F.2d 636, 638 (9th Cir. 1989), *cert. denied*, 498 U.S. 825, 111 S.Ct. 78, 112 L.Ed.2d 51 (1990), *United States v. Kimmel*, 672 F.2d 720 (9th Cir. 1982), and *Evans v. Raines*, 534 F.Supp. 791, 797 n. 9 (D.Ariz. 1982); a Tenth Circuit case which does not stand for the proposition for which it is cited, *United States v. Padilla*, 819 F.2d 952, 959-960 (10th Cir. 1987); a Pennsylvania Superior Court case, *Commonwealth v. Palmer*, 315

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representation becomes effectively *pro se* at some point before the defendant takes over sole control of the defense; that is, at the point at which the defendant's role is no longer merely supplemental to counsel's role.

In this case, Banks supplemented rather than supplanted his counsel, and so the dilemma need not be resolved.

Pa.Super. 601, 462 A.2d 755, 758 (1983); and the dissent in a Third Circuit opinion, *Bontempo v. Fenton*, 692 F.2d 954, 963 (3d Cir. 1982) (Sloviter, J., dissenting), *reh'g, reh'g in banc denied, cert. denied*, 460 U.S. 1055, 103 S.Ct. 1506, 75 L.Ed.2d 935 (1983).

We begin with the Tenth Circuit opinion, *Padilla*. In that case, the defendant elected to proceed *pro se*. The Tenth Circuit stated that the appointment of standby counsel is preferred in such circumstances but the court still must ensure that the waiver of the right to counsel is knowing and intelligent. 819 F.2d at 959-960. Banks recites the holding in this respect as "valid waiver of counsel required when there is anything less than full representation by counsel." Brief in Support of Petition for Writ of Habeas Corpus at 8. Actually, the opinion states, "Anything less than full representation by counsel raises the question of valid waiver of the right to counsel." *Padilla* at 960 (citations omitted).

Thus, while it is true that *Padilla* stands for the proposition that the court must examine whether the arrangement is one of hybrid representation or *pro se* status with standby counsel (the latter requiring a waiver of the right to counsel), and suggests that anything less than full representation gives rise to this duty to examine, it does not equate hybrid representation with *pro se* status. In fact, the Tenth Circuit in *Treff* (at 979 n. 6) noted that a request to proceed with hybrid representation is not deemed a request to proceed *pro se*, thereby specifically distinguishing the two situations. Also, in *Treff*, the defendant argued that his right to represent himself was violated when his request to participate in his defense was denied. The Tenth Circuit held that he did not make an unequivocal request to proceed *pro se*, and so the argument failed. It should be noted however, that the

defendant was permitted to begin an opening statement.[13] That action was not found to be the equivalent of proceeding *pro se*.

We conclude that the Tenth Circuit does *not* require a waiver of the right to counsel under *Faretta* before the trial court may exercise its discretion to permit hybrid representation.

Banks' citation to *Palmer* also misses the mark. In that case, the defendant elected to proceed *pro se* with the exception of selecting a jury, making closing remarks, and filing post-trial motions. Those actions would be left to standby counsel, who also would confer with the defendant during trial. *Palmer* at 758. The defendant would personally make an opening statement and examine witnesses. *Id.* at 758-759. The Superior Court held that this arrangement really did not constitute *pro se* representation but a partial waiver of the right to counsel. *Id.* at 759. Thus, a colloquy on the partial waiver was necessary, but only as to those aspects of the trial for which the defendant would be representing himself. *Id.*

Several points must be emphasized about *Palmer*. First, the Superior Court referred to Pa.R.Crim.P. 318(c), not the Constitution, as the basis for its ruling. Second, the trial court did instruct the defendant on those aspects of the trial for which he represented himself, which is the same as occurred in this case: the trial court warned Banks about the wisdom of those actions taken *pro se*. Finally, the Superior Court concluded in *Palmer* that the defendant was

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[13] Treff's opening statement was cut short when he accused the trial judge of bias. *Treff* at 979.

proceeding effectively *pro se*. We have not so concluded, and therefore the principle announced in *Palmer* is inapplicable.[14]

More on point is *State v. Layton*, 189 W.Va. 470, 477-479, 432 S.E.2d 740, 747-749 (1993) (citing, *inter alia*, *Bontempo*, discussed below, and *Palmer*), in which the rationale for distinguishing between *pro se* representation and hybrid representation is discussed thoroughly. Succinctly stated, when counsel participates in the defense of the case by assisting the defendant and actually presenting the defense, there is not the danger faced by a defendant who opts to represent himself or herself, or with merely a technical advisor. *Id.* at 478, 432 S.E.2d 740, 432 S.E.2d at 748 (quoting *State v. Barker*, 35 Wash.App. 388, 395, 667 P.2d 108, 113 (1983)).

We do not believe that it is necessary to determine the exact contours of what will constitute hybrid representation versus standby counsel or advisory counsel. Whatever the precise extent to which counsel must participate in the defense before counsel will be part of hybrid representation, as opposed to standby or advisory counsel, we think that there plainly was hybrid representation of Banks.

[14] In *Commonwealth v. Lloyd*, 370 Pa.Super. 65, 535 A.2d 1152, *allocatur denied*, 518 Pa. 637, 542 A.2d 1367 (1988) (table), the Superior Court relied on *Palmer* in holding that the standard of completeness of the colloquy under Rule 318(c) is lower when standby counsel is appointed. The Supreme Court of Pennsylvania abrogated *Lloyd* in *Commonwealth v. Brazil*, 549 Pa. 321, 326, 701 A.2d 216, 219 (1997), when it held that a full and complete colloquy is necessary whenever a defendant seeks to waive the right to counsel. This holding undermines, and probably abrogates, the holding of *Palmer* to the effect that a partial waiver only requires a partial colloquy.

We turn next to the only Third Circuit opinion cited by Banks, *Bontempo*, an appeal from the granting of a writ of habeas corpus. In that case, the state trial court was giving the final charge to the jury when the defendant interrupted by shouting, "I would like to say something." The outburst continued before the jury was removed from the courtroom. The judge indicated that the defendant would be permitted to address the jury (in effect a closing argument) and even to reopen the defense for further testimony, and allowed the defendant to consult with counsel. After consulting with his attorney and a short colloquy with the court, the defendant addressed the jury. 692 F.2d at 956. One of the defendant's arguments was that the additional summation deprived him of the assistance of counsel in violation of the Sixth Amendment. *Id.* at 959-961.

In a 2-to-1 decision, the Third Circuit found no violation of the Sixth Amendment for several reasons, such as the fact that his statement permitted him to place before the jury a number of matters which would not have been admissible had he testified under oath. The tactic also permitted the defendant to avoid cross examination on his prior criminal record. *Id.* at 960. Most important for present purposes is the following portion of a footnote in the majority opinion:

> As the dissent aptly notes, the unorthodox procedure used at the trial causes some difficulty in categorizing the alleged violations in this case. Although the dissent finds a partial deprivation of counsel in Bontempo's summation, *his remarks were really supplemental to, and not in lieu of*, retained counsel's closing to the jury. In the circumstances here; it is not clear that Bontempo's actions amounted to a "partial waiver of his right to counsel." . . .

Id. at 961 n. 6 (emphasis added).

In dissent, Judge Sloviter viewed the defendant's statement to the jury as a partial waiver of the right to counsel requiring the same inquiry as a complete waiver. *Id.* at 964. Rather obviously, a dissenting opinion would not be a valid basis on which this court may rely; we are bound by the majority opinion. Since the Third Circuit has held that a represented defendant may "supplement" his defense, the situation in this case, Banks' argument fails.

With respect to the opinions of the Ninth Circuit cited by Banks, we disagree with the reasoning and adopt instead the rationale stated in *Layton*. This would be so even if we were not bound by *Bontempo*.

Also, after this review of the law of hybrid representation, we note that Banks points to no opinion of the Supreme Court of the United States which would clearly establish that a criminal defendant is entitled to an inquiry by the trial court before it exercises its discretion to permit hybrid representation. Rather, *Faretta* and *McKaskle* were addressed to the right to proceed *pro se* and to the more traditional situation of a defendant appearing *pro se* with the court appointing standby counsel for the purpose of answering procedural questions. The absence of Supreme Court authority existed at the time of Banks' trial and continues today, so that retroactivity analysis is not implicated. Banks is not entitled to habeas relief in absence of such authority, and the claim numbered (1) must be denied on this basis.

VII. WAIVER OF RIGHT AGAINST SELF-INCRIMINATION

In his claim numbered (3), Banks alleges that he did not effect a knowing, intelligent and voluntary waiver of his right against self-incrimination under the Fifth Amendment. The primary basis for this claim is that Banks was not competent to waive his rights. The issue of competency has been addressed and resolved against Banks, and so this argument fails.[15] Banks is not entitled to habeas relief on the claim numbered (3).

VIII. JURY INSTRUCTIONS, VERDICT SLIP, JURY POLL

Banks' sixth claim is that the trial court's instructions to the jury, the verdict slip, and the jury poll in the sentencing phase all required the jury to find unanimously both aggravating and mitigating circumstances, in violation of the defendant's Eighth Amendment rights. Such a requirement would violate the rule of *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). *See also McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). As we noted in *Banks IV*, there is no substantial difference between the charge and verdict form used by the trial court in this case and the charge and verdict form reviewed by the Third Circuit in *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 306-309 (3d Cir.), *reh'g denied, cert. denied*, 502 U.S. 902, 112 S.Ct. 280, 116 L.Ed.2d 232 (1991).

> [The jury charge and verdict form] state repeatedly that the jury must find unanimously at least one

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[15] Regardless, it should be noted that the trial court in fact did warn Banks concerning his decision to testify.

> aggravating circumstance beyond a reasonable doubt and that any aggravating circumstances so found must out weigh any mitigating circumstances (to be found by a preponderance of the evidence). They also state that the final verdict must be unanimous. Nowhere is there a statement that any mitigating circumstances must be found unanimously by the jury before they could be weighed against any aggravating circumstances.

Banks IV at 1174. *See also DeShields v. Snyder*, 829 F.Supp. 676, 688 (D.Del. 1993) (reaching same conclusion reviewing similar jury instruction). In fact, other federal courts have been consistent in holding that there is no constitutional violation in jury instructions which state that the jury must be unanimous in finding aggravating circumstances and do not state that the jury must be unanimous as to any mitigating circumstances, but also do not specify that the jury need not be unanimous as to any mitigating circumstances. *See Noland v. French*, 134 F.3d 208, 213 (4th Cir.) (citing *Smith v. Dixon*, 14 F.3d 956, 981 n. 15 (4th Cir.) (en banc), *cert. denied*, 513 U.S. 841, 115 S.Ct. 129, 130 L.Ed.2d 72 (1994); *Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir.1993), *cert. denied*, 510 U.S. 1171, 114 S.Ct. 1208, 127 L.Ed.2d 556 (1994); *Maynard v. Dixon*, 943 F.2d 407, 418-420 (4th Cir. 1991), *cert. denied*, 502 U.S. 1110, 112 S.Ct. 1211, 117 L.Ed.2d 450 (1992)), *cert. denied*, 119 S.Ct. 125, 142 L.Ed.2d 101 (1998); *Duvall v. Reynolds*, 139 F.3d 768, 791-792 (10th Cir.), *cert. denied*, 525 U.S. 933, 119 S.Ct. 345, 142 L.Ed.2d 284 (1998); *Griffin v. Delo*, 33 F.3d 895, 905-906 (8th Cir. 1994), *reh'g, reh'g en banc denied, cert. denied*, 514 U.S. 1119, 115 S.Ct. 1981, 131 L.Ed.2d 869 (1995); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1120-1121

(6th Cir. 1990) (en banc; dissenting opinion),[16] *cert. denied*, 499 U.S. 970, 111 S.Ct. 1608, 113 L.Ed.2d 669 (1991).

In contrast, the Third Circuit has reviewed a jury charge similar to that used by the trial court in this case, and to many of those discussed in the cases cited above, and concluded that "it was reasonably likely that the jury could have believed that it was required to find the existence of mitigating circumstances unanimously before those circumstances could be considered in its deliberations." *Frey v. Fulcomer*, 132 F.3d 916, 924 (3d Cir. 1997), *cert. denied*, 524 U.S. 911, 118 S.Ct. 2076, 141 L.Ed.2d 151 (1998).[17] Banks relies on *Frey* due to the similarity of language in the jury charges.

There are several problems with reliance on *Frey*. First, it does not appear from the language of § 2254 that the principles enunciated in *Frey* are applicable to the case before us. *Frey* involved a habeas petition filed prior to AEDPA, so that the amended version of § 2254 did not apply. That section now permits the granting of relief only if the state courts' resolution of the federal issue "resulted in a decision that was contrary to, or *involved* an unreasonable application of," Supreme Court precedent. Sec. 2254(d)(1) (emphasis added). The use of the past tense indicates that it

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[16] Although part of the dissenting opinion, nine judges including the author joined the portion cited (designated Part IV of the dissent). Since thirteen judges were sitting en banc, Part IV commanded a majority.

[17] This issue is likely to recur, since the Supreme Court of Pennsylvania adamantly rejected the Third Circuit's opinion in *Frey*. *Commonwealth v. Cross*, 555 Pa. 603, ___, 726 A.2d 333, 336-338 (1999).

is the time of the state court decision that is relevant, not the time of habeas review. *See also* § 2254(e)(2)(A)(i) (condition for evidentiary hearing is that new rule of constitutional law has been made retroactive to cases on collateral review by Supreme Court, thereby precluding retroactivity analysis by habeas court). *Mills* was not decided until 1988, some five years after Banks' conviction and sentence, and has not been made retroactive by the Supreme Court. Because we find that the language of AEDPA establishes that the point in time at which the Supreme Court precedent must be "clearly established" is at the time that the state court makes its ruling on the federal constitutional issue, we do not address the parties' arguments concerning the retroactivity of *Mills*.

Moreover, as reflected in the decisions cited above, Supreme Court precedent (in the form of *Mills* and *McKoy*) did not require an outcome contrary to that reached by the state courts. That the Third Circuit reached a contrary result does not mean that the decision of the state courts was unreasonable.

Banks is not entitled to habeas relief on his claim numbered (6).

IX. PROPORTIONALITY REVIEW

Finally, Banks contends that the Pennsylvania statute governing proportionality review which was in effect at the time of his initial appeal to the Supreme Court of Pennsylvania violated his right to procedural due process.[18] This claim lacks merit for a number of reasons.

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[18] The provision requiring proportionality review by the Supreme Court of Pennsylvania, 42 Pa.Cons.Stat.Ann. § 9711(h),

(Continued)

First, proportionality is not constitutionally mandated. *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). In *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), the petitioner challenged some of the wording of an aggravating factor under the Arizona death penalty statute which had been limited by the state supreme court's construction. The Supreme Court of the United States found that, with the added interpretation, the challenged language provided sufficient guidance to the sentencer. *Id.* at 655, 110 S.Ct. 3047.

The Supreme Court added:

> Walton nevertheless contends that the heinous, cruel, or depraved factor has been applied in an arbitrary manner and, as applied, does not distinguish his case from cases in which the death sentence has not been imposed. In effect Walton challenges the proportionality review of the Arizona Supreme Court as erroneous and asks us to overturn it. This we decline to do, for we have just concluded that the challenged factor has been construed by the Arizona courts in a manner that furnishes sufficient guidance to the sentencer. This being so, proportionality review is not constitutionally required, and we "lawfully may presume that [Walton's] death sentence was not 'wantonly and freakishly' imposed -- and thus that the sentence is not disproportionate within any recognized meaning of the Eighth Amendment." *McCleskey v. Kemp*, 481

(Continued)

has been repealed. Act 28, Pub.L. 293, No. 28, § 1 (June 25, 1997), immediately effective. *See also Commonwealth v. Chester*, 1999 WL 419717, at *14 n. 16 (Pa. June 24, 1999).

> U.S. 279, 306, 308, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *Pulley v. Harris*, 465 U.S. 37, 43, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Further more, the Arizona Supreme Court plainly undertook its proportionality review in good faith and found that Walton's sentence was proportional to the sentences imposed in cases similar to his. The Constitution does not require us to look behind that conclusion.

Id. at 656-657, 110 S.Ct. 3047.

In other words, proportionality review is not an adversarial proceeding independent of the sentencing and appeal process. The standard in such an instance is that the sentencer, whether a jury or judge, must have sufficient guidance (statutory or case law) so that the death penalty is not wantonly or freakishly imposed. This being the case, the defendant does not have a right to have a federal court examine the state courts' decision on proportionality review.

Banks argues that he has a "liberty interest" which is not protected because the process of proportionality review is not adversarial, i.e. he did not have the opportunity to challenge or provide input into the decision of the Supreme Court of Pennsylvania. The Supreme Court rejected this argument in *Banks II*. It pointed out that its review is conducted pursuant to its decision in *Commonwealth v. Frey*, 504 Pa. 428, 475 A.2d 700, *cert. denied*, 469 U.S. 963, 105 S.Ct. 360, 83 L.Ed.2d 296 (1984).[19] *Banks II* at 474. The fact that the opinion gives a reasonable construction to the language is consistent with *Walton* and rebuts any contention that the statute itself gives insufficient guidance.

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[19] This is the same case as reviewed by the Third Circuit in *Frey v. Fulcomer*. *See* p. 36-37 and n. 17, above.

The Supreme Court also pointed out that the information on which it relied in conducting proportionality review is available at no cost to the public from the Administrative Office of Pennsylvania Courts. Thus, a capital defendant may obtain the information and, if necessary, investigate its accuracy. *Id.* A challenge to the accuracy of such information can be made to the Supreme Court on direct appeal or in a PCRA petition. Banks, for instance, raised his due process argument in his first PCRA petition, as reflected in the opinion. However, as noted by the Supreme Court, he pointed to no actual deficiency or inaccuracy in that information, nor that he was precluded from obtaining or investigating it. As we stated previously:

> In other words, Banks chose to argue the theory that if a deficiency or inaccuracy existed, he had no way to correct it, yet pointed to absolutely no deficiencies or inaccuracies. A theoretical deprivation is not a basis for habeas relief. Moreover, the opinion indicates that such a challenge may be made in the context of a petition for post-conviction relief.

Banks IV at 1175.[20]

We also reiterate what we stated previously regarding Banks' argument concerning the vagueness of the phrase "similar cases" for purposes of proportionality review: the phrase is ordinary English, not a term of art. No further

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[20] Since avenues of relief are available in the context of the ordinary criminal proceedings, we conclude that there is no procedural due process deprivation. We therefore do not address the concerns raised as *obiter dicta* by the Third Circuit in a footnote in *Frey*. *See id.* at n. 7.

clarification of the term is necessary to satisfy the Due Process Clause.

Banks is not entitled to habeas relief on his claim numbered (10).

X. CONCLUSION

We find no basis for the granting of relief under either of the conditions set forth in 28 U.S.C. § 2254(d), and Banks' petition for a writ of habeas corpus will be denied.

We are required to determine whether Banks has made a substantial showing of the denial of a constitutional right and, if so, to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed.R.App.P. 22(b)(1); *United States v. Eyer*, 113 F.3d 470 (3d Cir. 1997). If the Third Circuit determines that we have erred in applying AEDPA to Banks' claim relating to the jury instructions, verdict slip, and jury poll, then we would be constrained by the Third Circuit's opinion in *Frey* to conclude that Banks is entitled to a writ of habeas corpus. We have concluded that the verb tenses used in AEDPA indicate that the state court's holding must contravene Supreme Court precedent existing at the time of the holding. We cannot say conclusively that what seems to be plain language in a statute will govern the Third Circuit's conclusion as to the applicable time period. *See, e.g., Gibbs v. Roman*, 116 F.3d 83, 86 (3d Cir. 1997) (prisoner requesting leave to proceed without prepayment of fees under 28 U.S.C. § 1915 must allege that he or she was under imminent danger of serious physical injury at time of incident of which prisoner complains, and not at time of filing of complaint, despite statutory language that action may not be brought without prepayment of fees unless prisoner "*is* " under

imminent danger of serious physical injury[21]). *But see Banos v. O'Guin*, 144 F.3d 883 (5th Cir. 1998) (per curiam; proper focus is on time suit filed in district court, time of notice of appeal, or time of motion to proceed *in forma pauperis*); *Ashley v. Dilworth*, 147 F.3d 715 (8th Cir. 1998) (focus is on time of "filing"). We therefore will issue a certificate of appealability based on this issue.

An order consistent with this memorandum will issue.

ORDER

For the reasons stated in the accompanying memorandum, **IT IS ORDERED THAT**:

1. The petition for a writ of habeas corpus (record document no. 1) filed by petitioner George E. Banks is denied.

2. Banks' motion (record document no. 23) to amend the petition for a writ of habeas corpus is denied.

3. We certify pursuant to 28 U.S.C. § 2253(c); Fed. R.App.P. 22(b), that Banks has made a substantial showing of the denial of a constitutional right, specifically on the issue of whether the Third Circuit's opinion in *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997), *cert. denied*, 524 U.S. 911, 118 S.Ct. 2076, 141 L.Ed.2d 151 (1998), controls our consideration of Banks' petition and therefore requires issuance of the writ of habeas corpus.

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[21] In other words, "is" means "was" or, to quote a statement which has been the subject of considerable public debate in recent months, "It depends on what your definition of 'is' is."

4. The stay of execution issued by this court shall remain in effect pending further order of court.

COURT'S APPENDIX I

September 24 & 25, 1982: Shootings and stand-off with police

February 28, 1983: Preliminary competency hearing

March 14, 1983: Competency hearing

May 6, 1983: Competency hearing

June 21, 1983: Banks found guilty by jury

June 22, 1983: Jury returns sentencing phase verdict of death

October 17, 1985: Post-trial motions denied

November 22, 1985: Formal sentence imposed by Court of Common Pleas

February 13, 1987: Pennsylvania Supreme Court affirms judgment of conviction and sentence (*Banks I*)

May 28, 1987: Pennsylvania Supreme Court denies reargument

October 5, 1987: U.S. Supreme Court denies *certiorari*

September 8, 1993: PCRA petition denied

March 27, 1995: Denial of PCRA petition affirmed by Pennsylvania Supreme Court (*Banks II*)

October 2, 1995: U.S. Supreme Court denies *certiorari*

February 15, 1996: Death warrant signed

February 22, 1996: District Court stays execution

March 22, 1996: Petition for writ of habeas corpus filed in District Court

May 28, 1996: Petition found not mixed, unexhausted claims dismissed by District Court (*Banks III*)

August 30, 1996: Petition denied (*Banks IV*)

January 14, 1997: Second PCRA petition filed in Court of Common Pleas

September 19, 1997: Denial of petition for writ of habeas corpus reversed by Third Circuit (*Banks V*)

March 2, 1999: Denial of second PCRA petition affirmed by Supreme Court of Pennsylvania (*Banks VI*)

March 9, 1999: Second execution warrant signed

March 22, 1999: Petition for writ of habeas corpus filed in District Court

March 26, 1999: Execution stayed by District Court

May 7, 1999: Four claims dismissed by District Court as procedurally barred (*Banks VII*)

EXCERPT FROM BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS' PETITION FOR REHEARING EN BANC FILED AT 99-9005 (U.S.C.A. 3D CIR.)

INTEREST OF *AMICUS CURIAE*

The Attorney General is the chief law officer and chief law enforcement officer of the Commonwealth of Pennsylvania. Pa. Const., Art. IV, § 4.1; Commonwealth Attorneys Act, 71 P.S. § 732-206(a). The Attorney General regularly represents respondents in habeas corpus proceedings brought by state prisoners challenging their convictions and sentences in the federal courts pursuant to 28 U.S.C. § 2254. The Attorney General has an abiding interest in seeing that attacks on successful convictions obtained in the courts of Pennsylvania, which have withstood review in the State courts, are properly litigated in the federal courts and that the federal courts exercising their jurisdiction in habeas corpus proceedings properly apply the federal habeas statute as interpreted by the United States Supreme Court. This interest extends to the proper application of cases like *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny, which bar, with limited exceptions, application of new constitutional rules of criminal procedure by the federal courts in habeas corpus review to cases that were final on direct appeal in the State system before the new rules were announced.

The opinion of the panel in this case has serious implications for habeas litigation in the circuit in general, and in capital habeas litigation, in particular. The manner in which the panel addressed *Teague* (or failed to address it) will have ramifications in all habeas cases. The specific holding of the panel, invalidating a death sentence based on a perceived violation of *Mills v. Maryland*, 486 U.S. 367 (1988), will

directly impact at least thirty cases in which the Pennsylvania Supreme Court has rejected *Mills* challenges.[1] In most instances, as in this case, the State court addressed the merits of the claim and rejected it, oftentimes with an alternate holding.[2] In some of these cases the Supreme Court said that

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[1] To be sure, the Pennsylvania Supreme Court has found jury instructions or verdict slips which violated the teachings of *Mills* and granted relief. *See, e.g., Commonwealth v. Begley*, 780 A.2d 605 (Pa. 2001) (*Mills* error); *Commonwealth v. Young*, 572 A.2d 1217 (Pa. 1990) (*Mills* error); *Commonwealth v. Billa*, 555 A.2d 835 (Pa. 1989) (*Mills* error; *dicta*).

[2] *See, e.g., Commonwealth v. Kemp*, 753 A.2d 1278 (Pa. 2000) (no *Mills* error); *Commonwealth v. Murphy*, 657 A.2d 927 (Pa. 1995) (no *Mills* error); *Commonwealth v. Hackett*, 627 A.2d 719 (Pa. 1993) (no *Mills* error); *Commonwealth v. Thomas*, 744 A.2d 713 (Pa. 2000) (no *Mills* error; not ineffective for failing to predict change in law); *Commonwealth v. Holloway*, 599 Pa. 258, 739 A.2d 1039 (1999) (not ineffective for failing to predict change in law); *Commonwealth v. Rollins*, 738 A.2d 435 (Pa. 1999) (no *Mills* error); *Commonwealth v. Chester*, 733 a.2d 1242 (Pa. 1999) (no *Mills* error); *Commonwealth v. Breakiron*, 729 A.2d 1088 (Pa. 1999) (no *Mills* error; ineffectiveness not proven); *Commonwealth v. Holland*, 727 A.2d 563 (Pa. 1999) (no *Mills* error); *Commonwealth v. Porter*, 728 A.2d 890 (Pa. 1999) (no *Mills* error; not ineffective for failing to object); *Commonwealth v. Laird*, 726 A.2d 346 (Pa. 1999) (no *Mills* error; not ineffective for failing to object); *Commonwealth v. Blystone*, 725 A.2d 1197 (Pa. 1999) (no *Mills* error; not ineffective for failing to object); *Commonwealth v. Cross*, 726 A.2d 333 (Pa. 1999) (no *Mills* error; *Mills* not retroactive); *Commonwealth v. Albrecht*, 720 A.2d 693 (Pa. 1998) (no *Mills* error; not ineffective for failing to object); *Commonwealth v. Abu-Jamal*, 720 A.2d 79 (Pa. 1998) (no *Mills* error); *Commonwealth v. Whitney*, 708 A.2d 471 (Pa. 1998) (no *Mills* error; not ineffective for failing to predict change in law; *Mills* not

(Continued)

Mills was not applicable to cases that were final before the opinion in *Mills* was announced.[3] Some of these cases were final on direct appeal in the State courts before *Mills* was

(Continued)

retroactive); *Commonwealth v. Jermyn*, 709 A.2d 849 (Pa. 1998) (no *Mills* error; not ineffective for failing to raise issue; *Mills* not retroactive); *Commonwealth v. Henry*, 706 A.2d 313 (Pa. 1997) (no *Mills* error; not ineffective for failing to object); *Commonwealth v. Hardcastle*, 701 A.2d 541 (Pa. 1997) (no *Mills* error; not ineffective for failing to predict change in law; Mills not retroactive); *Commonwealth v. Travaglia*, 661 A.2d 352 (Pa. 1995) (no *Mills* error); *Commonwealth v. Smith*, 650 A.2d 863 (Pa. 1994) (no *Mills* error); *Commonwealth v. Wilson*, 649 A.2d 435 (Pa. 1994) (no *Mills* error); *Commonwealth v. Peterkin*, 649 A.2d 121 (Pa. 1994) (no *Mills* error; not ineffective for failing to object; *Mills* not retroactive); *Commonwealth v. Moore*, 633 A.2d 1119 (Pa. 1993) (no *Mills* error); *Commonwealth v. Young*, 637 A.2d 1313 (Pa. 1993) (no *Mills* error); *Commonwealth v. Marshall*, 633 A.2d 1100 (Pa. 1993) (no *Mills* error; not ineffective for failing to raise issue); *Commonwealth v. Stokes*, 615 A.2d 704 (Pa. 1992) (no *Mills* error); *Commonwealth v. Jones*, 610 A.2d 931 (Pa. 1992) (no *Mills* error); *Commonwealth v. Tilley*, 595 A.2d 575 (Pa. 1991) (no *Mills* error); *Commonwealth v. Jasper*, 587 A.2d 705 (Pa. 1991) ([no] *Mills* error); *Commonwealth v. Williams*, 570 A.2d 75 (Pa. 1990) (no *Mills* error); *Commonwealth v. O'Shea*, 567 A.2d 1023 (Pa. 1989) (no *Mills* error); *Commonwealth v. Frey*, 554 A.2d 27 (Pa. 1989) (no *Mills* error).

[3] *See, e.g., Commonwealth v. Cross, supra* (no *Mills* error; *Mills* not retroactive); *Commonwealth v. Whitney, supra* (no *Mills* error; not ineffective for failing to predict change in law; *Mills* not retroactive); *Commonwealth v. Jermyn, supra* (no *Mills* error; not ineffective for failing to raise issue; *Mills* not retroactive); *Commonwealth v. Hardcastle, supra* (no *Mills* error; not ineffective for failing to predict change in law; *Mills* not retroactive); *Commonwealth v. Peterkin, supra* (no *Mills* error; not ineffective for failing to object; *Mills* not retroactive).

announced.[4] Others were tried before *Mills* but decided on direct appeal after *Mills* was announced.[5] In many of those cases, the *Mills* issue had not been raised and preserved in the trial court and on direct appeal.[6] It was subsequently raised in a collateral proceeding attacking the judgment of sentence in the State courts under the Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. § § 9541 *et seq.*[7]

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[4] *See, e.g., Commonwealth v. Albrecht, supra; Commonwealth v. Whitney, supra; Commonwealth v. Jermyn, supra; Commonwealth v. Travaglia, supra; Commonwealth v. Smith, supra; Commonwealth v. Peterkin, supra; Commonwealth v. Frey, supra.*

[5] *Commonwealth v. Thomas, supra; Commonwealth v. Holloway, supra; Commonwealth v. Rollins, supra; Commonwealth v. Chester, supra; Commonwealth v. Breakiron, supra; Commonwealth v. Porter, supra; Commonwealth v. Laird, supra; Commonwealth v. Blystone, supra; Commonwealth v. Abu-Jamal, supra; Commonwealth v. Henry, supra; Commonwealth v. Hardcastle, supra; Commonwealth v. Wilson, supra; Commonwealth v. Moore, supra; Commonwealth v. Young, supra; Commonwealth v. Marshall, supra; Commonwealth v. Stokes, supra; Commonwealth v. Jones, supra; Commonwealth v. Tilley, supra; Commonwealth v. Jasper, supra; Commonwealth v. Williams, supra; Commonwealth v. O'Shea, supra.*

[6] In some instances, the issue was entertained on direct appeal even though the case was tried before *Mills* was announced. *See, e.g., Commonwealth v. Moore, supra; Commonwealth v. Young, supra; Commonwealth v. Stokes, supra; Commonwealth v. Jones, supra; Commonwealth v. Tilley, supra; Commonwealth v. Jasper, supra; Commonwealth v. Young, supra; Commonwealth v. Williams, supra; Commonwealth v. O'Shea, supra; Commonwealth v. Billa, supra.*

[7] *See, e.g., Commonwealth v. Thomas, supra;*

(Continued)

All of these death-sentenced prisoners whose challenges were rejected by the State Supreme Court will seek relief under the panel's decision.[8] As the Attorney General believes that the panel is in grave error, he files this petition *amicus curiae* in support of Respondents, Appellees herein, urging rehearing *en banc*.

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Commonwealth v. Holloway, supra; Commonwealth v. Rollins, supra; Commonwealth v. Chester, supra; Commonwealth v. Breakiron, supra; Commonwealth v. Porter, supra; Commonwealth v. Laird, supra; Commonwealth v. Blystone, supra; Commonwealth v. Cross, supra; Commonwealth v. Albrecht, supra; Commonwealth v. Abu-Jamal, supra; Commonwealth v. Whitney, supra; Commonwealth v. Jermyn, supra; Commonwealth v. Henry, supra; Commonwealth v. Hardcastle, supra.

[8] Indeed, the Attorney General is already involved in cases before this Court and the district courts where *Mills* claims are pending. *See Jermyn v. Horn*, 266 F.3d 257 (3d Cir. 2001); *Szuchon v. Lehman*, Nos. 00-9000 & 00-9001 (3d Cir.); *Carpenter v. Horn*, No. 95-9001 (3d Cir.); *Breakiron v. Horn*, No. 00-300 (W.D. Pa.); and *Blystone v. Horn*, No. 99-CV-490 (W.D. Pa.).